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No. [redacted] 885

IN THE

Supreme Court of the United States

October Term, 1970

SNYDER TANK CORPORATION,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent

APPENDIX.

WILLIAM K. BENNETT
ROBERT KAPUSTA
LEO P. CARROLL
BENNETT & KAPUSTA
75 Broad Street
Milford, Connecticut

No.

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APPENDIX.

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I. DECISION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

For The Second Circuit

Nos. 841, 842—September Term, 1969.

(Argued June 3, 1970 Decided July 1, 1970.)

Docket Nos. 33942, 34094

SNYDER TANK CORPORATION,
Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,
Respondent,

—and—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,
Intervenor.

Before:

LUMBARD, Chief Judge,
SMITH and KAUFMAN, Circuit Judges.

Petition to review, and application for enforcement of, order of the National Labor Relations Board based on findings of unfair labor practices in

violation of sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), (5).

Order enforced. Petition to review dismissed.

WILLIAM K. BENNETT, LEO P. CARROLL, Ansonia, Connecticut (Bennett & Kapusta, Ansonia, Connecticut, on the brief), for Petitioner.

ALLEN H. FELDMAN, National Labor Relations Board, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Mazoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Nancy M. Sherman, Madge F. Jefferson, on the brief), for Respondent.

BENJAMIN RUBENSTEIN, New York, N. Y., for Intervenor.

PER CURIAM:

Snyder Tank Corporation petitions for review of a bargaining order issued against it, while the National Labor Relations Board applies for enforcement. The affected union, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, intervened on the side of the NLRB.

The facts, as found by the NLRB, follow a pattern manifest in many similar controversies: an organization campaign, a putative authorization card ma-

jority, alleged unfair labor practices by the company, a company victory in a representation election, and a bargaining order from the NLRB. In September, 1966, the intervenor union (the UAW), began an organization drive among the Snyder employees. As a part of its campaign, the union solicited authorization cards. The wording on the cards was clear and precise; it simply designated the union as the employee's "representative for the purpose of collective bargaining."[1] As the cards were circulating among the employees, union meetings were held, and several supervisors interrogated various employees about their feelings towards the union. The supervisors also suggested that the advent of the union would mean harsher working conditions and strained relations between employees and supervisory personnel.

By October 7, 1966, the union had received authorization cards from over half the employees, and wrote to the company demanding recognition. At the same time the union filed a representation petition with the Board. The company refused to bargain, stating that it doubted that the union had been "voluntarily designated by an uncoerced majority."

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[1]After the heading "Authorization Card," and the union's name, the card read:

> "I, the undersigned, hereby designate, select and empower the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW, AFL-CIO) as my representative for the purpose of collective bargaining in respect to rate of pay, wages, hours of employment and other conditions of employment."

While the Board was conducting representation hearings in October and November, the company continued to express opposition to the union. Some employees were told again that working conditions would be more difficult if the union were to win; others were informed that they might be laid off for lack of seniority or failure to pass physical examinations. Douglas Gravelle, an employee with an excellent work record, who had been primarily responsible for initiating the union organization drive, was discharged for a minor violation of company work rules, despite an absence of any indication that other employees had been released for similar first infractions.

As the January 19, 1967 election approached, interrogation and thinly veiled threats continued. The president of the company sent a letter to all employees, referring to other companies that had gone out of business as a result of unionization. Although disclaiming any threat that Snyder would do so if it continued to make a reasonable profit a later memorandum informed the employees that the usual yearly wage increases were being held up for fear that the raises might be held an unfair labor practice by the Board. Similar remarks were made in a speech by the company president the day before the election. The union lost the election, and filed unfair labor practice charges within the week.

The Board found that the company violated sec-

tion 8(a)(1) of the National Labor Relations Act[3] by interrogating the employees coercively, by issuing barely disguised threats of closing the plant, by warning of more onerous working conditions if the union won, and by promising benefits if the employees rejected the union overtures. These factual findings, supported by substantial evidence outlined above, are sufficient to warrant the Board's conclusion that the company violated §8(a)(1). See, e.g., **NLRB v. Gissel Packing Co.**, 395 U.S. 575, 618-20 (1969) (plant closure threat); **NLRB v. Exchange Parts Co.**, 375 U.S. 405, 409 (1964) (promise of benefit); **Federation of Union Representatives v. NLRB**, 339 F.2d 126, 129-30 (2d Cir. 1964) suspension of automatic benefits); **NLRB v. Milco, Inc.**, 88 F.2d 133 (2d Cir. 1968) (coercive interrogation).

Similarly, substantial evidence supports the

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[3] "§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor movement . . . ;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." National Labor Relations Act, ch. 372, §8, 49 Stat. 452 (1935), as amended, 29 U.S.C. §158.

Board's conclusion that Gravell was discharged not for violation of work rules (since the company could cite no other instance in which a firing took place for a first offense), but because of the leading role that he took in assisting the union organization drive. Discriminatory firings violate §§8(a)(3) and 8(a)(1), and warrant the reinstatement ordered here. See **Textile Workers Union of America v. Darlington Mfg. Co.**, 380 U.S. 263 (1965); **NLRB v. Dorn's Transportation Co.**, 405 F.2d 706, 712-13 (2d Cir. 1969).

Finally, the company challenges the propriety of the bargaining order which was issued in this case. It is now well settled that when a union has obtained a valid authorization card majority, and the company's subsequent conduct makes a fair election impossible, the Board may order the company to bargain with the union despite the union's loss of an intervening representation election. See **NLRB v. Gissel Packing Co.**, 395 U.S. 575 (1969). The union obtained authorization cards from 80 of the 151 employees, and the company, in order to defeat the bargaining order, seeks to demonstrate that at least four of the cards are invalid. Primary reliance is placed on alleged misrepresentations made to the employees as they signed. We must adhere to the rule that:

> "... employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language

above his signature." **NLRB v. Gissel Packing Co.**, 395 U.S. at 606.

The cards were clear on their face; and the trial examiner and the Board resolved what conflicting testimony there was against the company. We cannot invalidate a sufficient number of the cards to dissipate the majority without engaging in the forbidden practice of probing "an employee's subjective motivations." **Id.** at 608. We find the company's attack on the remaining cards, and on the fairness of the hearing before the trial examiner, equally unconvincing.

The section 8(a)(1) and 8(a)(3) violations discussed above provide sufficient support for the Board's conclusion that the company violated section 8(a)(5) by refusing to recognize the union and by engaging in a concerted anti-union campaign that made the holding of a fair election unlikely and undermined the union's majority. Based on that finding, the Board had the power to issue a bargaining order. **NLRB v. Gissel Packing Co.**, 395 U.S. at 610.

The petition for a review is denied, and the petition for enforcement is granted.

II. STATUTES INVOLVED.

National Labor Relations Act, 29 U.S.C. 151 et seq.

SEC. 8. (a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: **Provided**, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: **Provided further**, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . .

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

U. S. Constitution, 5th Amendment

"No person shall be . . . deprived of life, liberty, or property without due process . . ."

III. DECISION — TRIAL EXAMINER

(p. 1)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

SNYDER TANK CORPORATION
and
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO

Joseph B. Luksch, Esq., of Buffalo, N.Y., for the General Counsel.

William K. Bennett, Esq., and **Robert Kapusta, Esq. (Bennett & Kapusta)** of Ansonia, Conn., and **Mr. John F.**

Sullivan of New Haven, Conn., for the Respondent.

Benjamin Rubenstein, Esq., of New York, N.Y., for the Charging Party.

Cases 3-CA-3101-2,
3-CA-3199,
3-CA-3431, and
3-RC-4030

TRIAL EXAMINER'S DECISION

Statement of the Case

MORTON D. FRIEDMAN, Trial Examiner: Upon a charge filed in Case 3-CA-3101-2 on December 5, 1966, by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, herein called the Union or the UAW, and a charge filed by the said Union in Case 3-CA-3199 on April 7, 1967, the Regional Director for Region 3 of the National Labor Relations Board, herein called the Board, issued an order of consolidation, a consolidated amended complaint, and notice of hearing on July 28, 1967, on behalf of the General Counsel of the Board against Snyder Tank Corporation, herein called the Respondent or the Company, alleging violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151, **et seq.**), herein called the Act.

On April 28, 1967, the said Regional Director issued an order directing hearing in Case 3-RC-4030 on objections timely filed by the Union to alleged conduct of Respondent allegedly affecting the elec-

tion previously held in said proceeding. On the same day, April 28, 1967, the said Regional Director, in his order of consolidation, heretofore mentioned, ordered Case 3-RC-4030 consolidated with the other cases heretofore set forth for purposes of hearing, ruling, and decision.

Thereafter, and while the cases above mentioned were being heard, the Union filed a charge in Case 3-CA-3431 on February 13, 1968, upon which a complaint was issued by the said Regional Director on April 9, 1968, alleging further violations of Section 8(a)(1) and (3) of the Act. By order dated May 9, 1968, the Trial Examiner in this proceeding ordered Case 3-CA-3431 consolidated with the other cases herein and ordered that a hearing be held thereon.

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In its duly filed answers to the foregoing complaints, the Respondent, while admitting certain allegations of the complaints, denied the commission of any unfair labor practices.

Pursuant to notice, the hearing of the consolidated cases was held before me at Buffalo, New York, on various dates between October 18, 1967, and May 27, 1968. All parties were represented and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs. Briefs were filed by the General Counsel, the Respondent, and the Charging Party. Upon consideration of the entire record, including the briefs of the parties, and upon my observation of each of the witnesses as they appeared before me, I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent, a New York corporation, maintains its principal office and plant in the city of Buffalo, State of New York, where it is engaged in the manufacture, sale, and distribution of gasoline tanks and related products. During the 12 months immediately preceding the issuance of the complaints herein, a representative period, the Respondent purchased, transferred, and delivered to its plant involved herein, goods and materials of a value in excess of $50,000, which goods and materials were transported to said plant directly from the States of the United States other than the State of New York. During the same period, Respondent manufactured, sold, and distributed from its plant involved herein products valued in excess of $50,000, of which products of a value in excess of $50,000 were shipped from said plant directly to States of the United States other than the State of New York.

It is admitted, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Background and Issues

Sometime during the month of September 1966, the Union began an organizing campaign among the Respondent's production and maintenance employees. During this period of time, it solicited union authorization cards from the employees at the plant and at meetings held for that purpose at the union hall. After the Union had secured what it deemed to be a majority of authorization cards, it sent, on October 7, 1966, a letter to the Respondent requesting recognition and bargaining. Shortly thereafter the Union filed a petition for representation with the Board and on October 12, 1966, the Respondent by letter rejected the Union's request for recognition on the ground that the Respondent did not believe the Union had been voluntarily designated as bargaining representative by a majority of the Respondent's employes. Pursuant to the Union's petition to the Board, a representation hearing was held and an election ordered by the Regional Director. The election was held on January 19, 1967. The results of that election showed that a majority of the employees did not vote for the Union. Thereafter the Union filed timely objections to conduct which, it claimed, affected the results of the election.

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During the period from the beginning of its organizational drive up to the election, the Union and the Respondent waged vigorous and aggressive campaigns marked by claims and counterclaims made in

various written communications to the Respondent's employees and by speeches made by the Respondent's officials. The Union and the General Counsel allege generally that the conduct of the Respondent's officials and supervisory personnel during this campaign period constitutes, in the main, the basis for the charges and the objections filed herein.

More specifically, the complaints herein allege, in substance, that the Respondent, through its officers and/or supervisors, unlawfully interrogated employees concerning their union activities, created the impression of surveillance of employees' union activities, threatened reprisals and removal of the plant in the event of union success, and made promises of benefit to induce employees to reject the Union.

The complaints further allege that the Respondents discriminatorily discharged employees Douglas Gravelle and James Scott because of their union activity. Additionally, the complaints allege that the Respondent refused to bargain in good faith with the Union which, it is alleged, is the majority representative of the Respondent's production and maintenance employees.

The Respondent's answers admit the jurisdictional allegations of the complaints but deny each and every allegation concerning the alleged violative conduct of the Respondent. With regard to the allegations of refusal to bargain, the answers also allege that the Union did not enjoy majority status among the Respondent's employees at the time the Union made its demand for recognition.

Thus, broadly, the issues framed by the pleadings are:

1. Did the Respondent interfere with, coerce, and threaten its employees, in the manner set forth above, in violation of Section 8(a)(1) of the Act.

2. Did the Respondent discriminatorily discharge employees Douglas Gravelle and James Scott because they engaged in activities on behalf of the Union in violation of Section 8(a)(3) and (1) of the Act.

3. Did the Respondent refuse to bargain because it had a good-faith doubt that the Union was majority representative of the Respondent's employees in violation of Section 8(a)(5) and (1) of the Act. In connection with this issue, there is the further issue of whether the Union represented a majority of the Respondent's employees in an appropriate unit.

4. With regard to the objections to conduct affecting the elections filed by the Union, did the foregoing conduct, if found, constitute conduct which interfered with the exercise of free choice by the employees participating in the election so as to warrant setting aside the election.

B. Interference, Coercion, and Restraint

1. Interrogation

Heretofore, I have alluded to the vigorous manner in which the Union and the Respondent pressed

their respective campaigns. Much that was said and much of the written material circulated by each was purely factual, but an equal quantity was accusatory and, at times, vituperative. Each party accused the

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other of lack of candidness and, indeed, of outright misrepresentation. To say that feelings ran high would be an understatement. Thus, in this atmosphere, marked by the hurling of verbal brickbats, the employees of the Respondent were made aware of the Respondent's and the Union's strong antipathy for one another. And it was in this atmosphere, permeated by mutual antagonism, that the events, below described, occurred.

Dennis Gravelle worked under Night Foreman Raymond Pajak. During the early part of the union campaign he had several conversations with Pajak after union meetings. These conversations took place in the plant. During the first conversation, Pajak wanted to know what happened at the union hall, what was said, and what was done. There were several such conversations and each started with Pajak's asking Gravelle what happened at the meetings.[1]

Also during the time at which the Union was beginning its campaign in the Respondent's shop, Har-

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[1]From the credited testimony of Dennis Gravelle. Pajak admitted that he might have had a conversation with Dennis Gravelle but he denied that he asked Gravelle anything about the union meetings. From my observation of the witnesses I do not credit Pajak's denials.

ry Stark, a working foreman on the day shift, had a conversation with employee James Phillips. Stark greeted Phillips and then asked the latter what he thought about the Union. Phillips answered that he thought it was a good idea.[8]

Several days after the incident with Stark, Robert Plarr, a supervisor in the machine shop, had a conversation about the Union, also with Phillips. Plarr asked Phillips what the latter thought about the Union and Phillips told him. This conversation occurred at Phillips' work station.[9]

Sometime shortly after the cards were circulated among the employees in the plant, Shipping Foreman Charles Maue engaged employee Delbert M. Hinderliter in a conversation regarding the Union. Maue came to Hinderliter's work station and started the conversation. Hinderliter told Maue that it was nobody's business about the reason he wanted the Union, if he wanted it, and what he wanted to do.

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[8]From the credited testimony of James Phillips. Stark gave a different version of this conversation stating that it was Phillips who asked Stark what the latter thought about the Union. I credit Philipps' version.

[9]As in the case of Stark, Plarr denied that he ever had a conversation with Phillips about the Union. However, after his denial he admitted that Phillips approached him on three or four different occasions, calling him by his nickname "Butch," and asking him what he thought about the Union. According to Plarr he said that what he would answer would be his personal opinion and as far as he was concerned they didn't need one. I credit the Phillips version of the conversation.

During this conversation Maue asked Hinderliter what the latter thought about the Union.[4]

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Maue engaged in further interrogation of employees. Thus, around the middle of October 1966, employee Ronald Guest went into Maue's office to obtain a blueprint and Maue asked Guest, "How are you going to vote for the Union?"

Guest answered that he did not know and that it was none of Maue's affair.

About a month before the election, Maue engaged employee Louis J. Shattuck in a conversation near Shattuck's work station near the paint booth. Maue asked Shattuck what the latter thought about the Union and then asked him further how the latter was going to vote. Shattuck answered that he would not know until he got into the voting booth and that this was a matter for his own selection.[5]

Foreman Harry Stark also engaged in further acts

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[4]From the credited pretrial affidavit of Hinderliter, which was adopted by Hinderliter on the witness stand. Hinderliter, who had been promoted to a supervisory position between the time of the incident and the time of his testimony, was an apparently reluctant witness for the General Counsel. At first he was most reluctant to testify against the Respondent but after being confronted with his pretrial affidavit he reluctantly admitted the events set forth above. Under these circumstances I do not credit Maue's denial of the incident.

[5]From the credited testimony of Guest and Shattuck.

of interrogation of employees. For example, Stark had a conversation with employee Charles D. Smith about 2 weeks before the election. Stark asked Smith what the latter thought about "this union business." Stark said that it was a rough business and that it was not going to do anybody any good.

In almost a like context, Stark, a couple of days before the election, stopped at employee Richard Reiber's work station and asked the latter how he felt about the Union. They discussed it for a while. Reiber told Stark what he liked about the Union and what he did not like.[6]

About a week before Christmas 1966, Foreman Louis Taylor had a conversation in the lunchroom with employee Bence. Taylor asked Bence how the latter felt about the Union. Bence told Taylor that he did not know, that he mas not sure.[7]

About 3 weeks before the election Taylor engaged employee Louis Shattuck in a conversation. Taylor came up to Shattuck at the latter's work station and asked how Shattuck felt about the Union.[8]

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[6]From the credited testimony of Smith and Reiber.

[7]From the credited testimony of Bence. Taylor denied that he ever had a conversation concerning the Union with employee Bence. I do not credit Taylor's denial.

[8]Taylor did not deny this conversation with Shattuck. Accordingly, I credit Shattuck's uncontroverted testimony.

Taylor asked a like question of employee Karl Datzer about 1 day before the election.[9]

A petition in the form of a letter to the Regional Director of the Board dated January 27, 1967, was circulated in the plant by employee James D. Lewis. This petition, which was circulated after the election

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in the presentation proceeding, stated that the employees who had signed the petition desired the Regional Director not to process any further matters with regard to the UAW because they felt that the UAW had lost fairly and that the employees had voted against the Union without coercion or any pressures being placed upon them. While he was circulating this petition, Lewis was engaged in a conversation with Working Foreman Plarr. At that time a number of the employees had already signed. Plarr asked Lewis if the latter had let everybody read the petition including James Scott and Scott's helper. Lewis answered that he had and that he had let everybody in the shop read it. Then Plarr asked Lewis if Scott had signed the petition. Lewis answered that Scott had not.[10]

In a different vein, around January 1967, at the

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[9]Although Taylor denied that he ever had any conversation with any employees about the Union, I cannot credit this denial. I do not believe that all three employees who claimed Taylor asked them questions regarding the Union were not truthful.

[10]From the credited testimony of Lewis. Plarr did not deny this incident.

time that the General Counsel of the Board was investigating the charges filed in this proceeding, employee George Glore gave an affidavit to a Board investigator. A couple of days thereafter, Glore was summoned to the office of Gerald Snyder, the Respondent's president. There Snyder asked Glore whether the latter had talked to a man from the Board. Glore said that he had. In that same conversation Snyder asked Glore if the latter had asked the Board or the Board investigator for a copy of the statement Glore had given the investigator."[11]

Clearly, the incidents in which the various supervisors, as set forth above, inquired of the employees as to their union membership, activities, desires, and preferences constitute unlawful interrogation in violation of Section 8(a)(1) of the Act. I so find.

Likewise, Plarr's inquiry of employee Lewis as to whether employee Scott and the latter's helper had signed the petition to the Regional Director was an unlawful inquiry into an employee's union or anti-union sympathies. For this reason it is violative of Section 8(a)(1) of the Act.

However, the interrogation by Gerald Snyder of

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[11]From the uncontroverted admissions of George Glore. Glore was a most reluctant witness for the General Counsel. During his testimony his refusals to answer questions was so apparent that I declared him, upon motion by the General Counsel, as a hostile witness. Although Glore by the time he testified had left the Respondent's employ, he admitted that he still owed a considerable sum of money to the Respondent on a loan he had made from the Respondent.

employee Glore as to whether the latter had given a statement to a Board agent and whether Glore had obtained a copy of such statement, although not necessary or material to the preparation of the Respondent's defense to this proceeding, were nevertheless nonviolative, I find, because the coercive element in this inquiry would seem to have been very slight, if, indeed, existent at all.[12]

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2. Warnings of Loss of benefits and of more onerous working conditions

Shipping Foreman Maue engaged in other incidents in which employees of the Respondent were involved. Thus, approximately the time that the cards were being signed, Maue engaged employee Stuhr in a conversation. Stuhr was talking to his brother who is also employed in the plant. Maue evidently overheard the conversation and came over to where the two were talking. They had been discussing the Union at the time and Maue said that he had been in places before where, after the union came in, there had been a slowdown in the amount of work available for the employees. He said that as a result, some of the employees had been laid off.[13]

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[12]See **Raytheon Company**, 160 NLRB 1603, 1609, fn. 4.

[13]From the uncontroverted testimony of employee Stuhr. Although Maue in testifying denied or gave different versions of the many incidents in which he was involved, he did not deny the Stuhr incident above related. Acordingly, I credit Stuhr's testimony.

Also, in the organizing period, probably a day or so after Gerald Snyder made his first talk to the employees, as hereinafter set forth, Maue engaged employee Walter Baker in a conversation near Baker's work station at the test tank. During that conversation Maue stated that if the employees thought they had it tough at the present time they should wait until a union got in and they'd really have it rough. He said that the employees took too much time off and if the employees took too much time off the Union would get rid of them. Then he went on to say that the employees would not be able to have any more coffeebreaks or talk to anybody else while they were working. He said they would have to stay right on the job and do nothing but work.[14]

About a week or two after John S. Piechocki signed his card he had a conversation with Maue at the bullpen in the plant. Piechocki had just arrived on the afternoon shift and was about to change his clothes in the bullpen. Maue approached Piechocki, looked at him, and said that he had heard that Piechocki was pretty enthusiastic about the Union. Pie-

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[14]Maue, in testifying, gave a different version of the conversation. He stated that Baker was the one who called him over and started the conversation by asking Maue what the latter thought about the Union. After stating what he thought were the good things and the bad things about the Union, Maue told Baker that it was the men's responsibility to stay on the job and not to come in late and that he didn't think the Union would back a man if he was continuously absent or if he took five or six coffeebreaks a day. Inasmuch as I have heretofore not credited Maue when his versions of the incidents differed from the versions of the employees, I do not credit him here.

chocki admitted that he was in one way and in another way he was not. Then Maue continued to talk about the Union. Among the things Maue stated about the Union was that the Union would not tolerate the time the employees took off on the days on

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which they did not call in. He also stated that if the Union came in the employees would not have as many coffeebreaks or as long coffeebreaks as they had at the present time in the plant. Maue ended the conversation by stating that the employees would have to "hustle" from the time they got in to the time they left.[15]

Also, during the union campaign, Maue had a number of conversations with employee Chad Troup, whom Maue supervised. These conversations were almost always of the same nature. Maue told Troup, in effect, that if the men voted the Union in they were stupid because the hours would be cut and there would be stricter work rules. He said there would not be as many coffeebreaks and that the men would not be able to talk "around" to each other.[16]

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[15]From the credited testimony of Piechocki. Maue admitted that he had a conversation with Piechocki about the Union and actually referred in his testimony to the conversation about coffeebreaks although he did not admit that he said there would be less coffeebreaks after the Union came in.

[16]From the credited testimony of Troup. Although Troup admitted on cross-examination that he hated Maue, and I would ordinarily give little weight to his direct examination because of this admission, nevertheless, the incident with regard to Troup was so similar to the other incidents in

Maue had a number of conversations with employee Kenneth Broadbent. These usually occurred together with other employees in the shipping room which Maue supervised. At one time Maue said that anyone who supported the Union was stupid; that if they were a minute late, if the Union came in, they would be sent home. He also stated that there would be no talking to anybody while in the plant. Then on another occasion Maue said that if anybody wanted to pay him $60 he'd represent them. On several occasions when a group of employees were talking Maue would come up to them and tell them to get back to work and then he would add that the men wouldn't do this if the Union was in and that if the Union was in people could not go for coffee as much."

As noted above, Maue had a conversation about a month before the election with employee Louis J. Shattuck in which he asked Shattuck how the latter was going to vote. After Shattuck said that he would not know until he went into the booth to vote Maue said that the Union would hurt the place and that they would have to cut down to 40 hours a week. He also stated that the employees would have to ask if they wanted to use the bathroom and that they wouldn't get as many coffeebreaks as they had at

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which Maue was involved, that I credit Troup's version of the incidents and do not credit Maue's.

"From the credited testimony of Broadbent. Broadbent admitted he was not on very good terms with Maue. However, because of the nature of the conversations and because of its similarity to other conversations with other employees I credit Broadbent's version.

the present time. It should be noted, in connection therewith, that at the time of the conversation the employees were working 60 hours a week and Maue's expression of cutting down time meant that the men would be cut down to 40 hours or a regular workweek.[18]

(p. 9)

Also, around the first of October, Maue had a conversation with employee Howard Stutz. Maue told Stutz, in talking about the Union, that if the Union got in things would be "worse" around there.[19]

According to the testimony of several witnesses, Foreman Harry Stark engaged in like conversations with various employees. Thus, according to employee Anthony Bordonaro, around Thanksgiving 1967 he had a conversation with Stark. This conversation took place near the coffee machine in the plant. Stark told Bordonaro that the latter would not have coffeebreaks like he had then if the Union were to come in. Anytime that he wanted to get coffee he could at the present time; this would stop according to Stark.[20]

About the middle of the union campaign, employee Fred Schmidt was standing around talking to two other employees just before the lunch whistle

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[18]From the credited testimony of Louis J. Shattuck whom I have credited over Maue heretofore.

[19]From the credited testimony of Stutz.

[20]From the uncontroverted testimony of Bordonaro. Stark did not testify as to the Bordonaro incident.

blew. Stark came up to them and told them that if the Union came in they'd have to work "a darn sight harder" and that they would have to work right up until the whistle blew."[21]

Stark also had a conversation prior to the election, perhaps 2 weeks before, with employee Charles D. Smith. In that conversation he told Smith that the Union was a "rough business" and it wasn't going to do anybody any good. Stark said that the men would be getting pushed around more or less if the Union instituted seniority in the place. For instance, he told Smith that his job on the cylinder line would not be guaranteed; that if the Union came in and seniority were instituted certain men in the welding department, certain welders, would have their eye on Smith's job; that they would be senior to Smith and would therefore have preference."[22]

Night Supervisor Pajak was also involved in a couple of incidents. After the first meeting of the Union, Pajak told Dennis Gravelle that if the Union got in the employees would have to stay at their machines the full 10 hours of the work session with no walking around "or anything of that sort."[23]

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[21]From the credited testimony of Schmidt. Although Stark denied that he ever had a conversation about the Union at any time with Schmidt, I do not credit Stark's denial.

[22]I credit the testimony of Charles Smith as against the bare denial of Stark that he ever had a conversation with Smith about the Union.

[23]From credited testimony of Dennis Gravelle. Pajak admitted that he might have had a conversation with Gravelle but he did not remember having any concerning the Union.

Pajak supervised employee Gary Scherff in the back shop at night. Scherff's work was performed on a punch. Pajak told Scherff that if the Union came in the punch would be humming all the time and there would be work there all the time. He further told Scherff that the latter would not be running to the coffee machine for coffee and that he would do nothing except work; nor would there be any talking to anybody else and all the employees would work a lot harder.

(p. 10)

On another occasion, about a month or two before the election, Scherff had a further conversation with Pajak in which Scherff asked Pajak if the latter had heard anything about Scherff's being promoted to the position of tester. Pajak answered that if the Union got in Scherff's chances of being promoted to a tester would not be too good. As a matter of fact Pajak went so far as to say that if a union got in he did not think Scherff would be placed in the position of tester. This was so, according to Pajak, because Scherff was not employed by the Respondent long enough to overcome the seniority claims of employees who were there longer than Scherff. Pajak further said that if the Union did not make it Scherff's chances of becoming a tester would be much greater since the Respondent would be giving jobs to the employees whom management wanted to fill the jobs rather than those who merely had

seniority, the way the Union would want the jobs to be assigned."[24]

At the beginning of the Union's campaign, approximately at the time that Gerald Snyder gave his first speech to the employees, Foreman Hugh Salsbury had a conversation with employee Joseph Bach. This took place at Bach's work station on the terne plate line. During this conversation Salsbury mentioned several times that if the Union were to get into the plant the chances were that Bach would be bumped off the terne plate by men with more seniority. Also, around the same time Bach had a further conversation with Hugh Salsbury. This occurred when all of the men were standing around talking and Salsbury told them that if the Union were to get in there would not be as many coffee-breaks as the men were taking at the present time. Salsbury also told them that they would be working harder."[25]

Early in the campaign, Supervisor Donald Smith had a conversation with employee Robert Fries. They were talking about how permissive the Respondent had been with regard to allowing people to come in late and taking days off whenever they felt like it. Smith then said that once the Union

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[24]From the credited testimony of Gary Scherff. Pajak admitted that he had a conversation about the Union with employee Scherff. However, he could not give the specifications of that conversation. The only thing that he denied was that he started the conversation with Scherff.

[25]From uncontroverted, credited testimony of Bach. Salsbury did not testify.

would come in this freedom probably would no longer exist. He added that employees would not be able to come in late or take a day off whenever they felt like it without getting into trouble. This conversation occurred in the machine shop where both Smith and Fries worked.[26]

Early in the campaign Plant Superintendent Herman Zimmel had a conversation with employee James W. Phillips. In that conversation, Zimmel told Phillips that if the Union got in the employees would not be able to talk to him, they would have to go through the Union, and that this would cut out all friendship.[27]

(p. 11)

About a week to a week and a half after Maue spoke to him, as set forth above, Louis J. Shattuck had a conversation with Night Foreman Louis Taylor. This took place near Shattuck's place of work in the paint booth. Taylor came up to Shatuck and asked the latter how he felt about the Union. Then Taylor told Shattuck that if the Union got in the plant would go on 40 hours and he said that although the men might think that the pay rate would be high-

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[26] From the uncontroverted, credited testimony of Fries, Smith did not testify.

[27] From the credited testimony of Phillips. Zimmel admitted that during the union campaign he might have had a conversation with Phillips but denied that he spoke to him about the Union. I do not credit Zimmel's denial.

er it would not be, it would be the same or perhaps even lower."[28]

I find that all of the foregoing incidents constitute warnings to employees that they would lose existing employment benefits and privileges and that working conditions would worsen if the Union came into the plant. Such warnings constitute interference, coercion, and restraint. Accordingly, I find that thereby the Respondent has violated Section 8(a)(1) of the Act.

3. Threats of discharge and layoff

I have, above, referred to the incident in which Maue told employee Stuhr and the latter's brother that he had been in places before where the union had come in and that there had been a slowdown in the amount of work. He stated that as a result some of the men were laid off. In addition, Maue was engaged in other incidents of like import. Thus, a week or two after employee John Piechocki had signed his card he had a conversation with Maue at the bullpen in the plant. I have already set forth part of this conversation, above, in which Maue started the conversation by telling Piechocki that he had heard that the latter was pretty enthusiastic about the

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[28] From credited testimony of Louis J. Shattuck. I have heretofore credited Shattuck on other matters. Taylor's denial that he ever had a conversation with any employee concerning the Union is not credible in view of the number of employees who testified that Taylor did have conversations with them concerning the Union.

Union. After Piechocki admitted that he was in one way enthused about the Union, Maue told him that if the Union got in men with 6 months' or less seniority would be the first ones out the door. He also told Piechocki there were some employees in the plant who could not pass the physical. They would be the first ones out."[29]

I have also referred above to a conversation which Maue had with employee Guest which occurred when Guest came to Maue's office for a blueprint. In that conversation, after asking Guest how the latter was going to vote for the Union, Maue told Guest that if the Union would come into the plant there would be strikes and layoffs and other actions of this nature that could affect the employee's family."[30]

(p. 12)

Shortly after the beginning of the union campaign employee James Phillips had a conversation with Maue. This took place at Phillips' work station. Maue told Phillips that Maue could go to Herman Zimmel and have the employees fired if they were for the Union."[31]

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[29]From the credited testimony of Piechocki, I have already credited Piechocki's testimony over Maue's denials.

[30]From the credited testimony of Guest.

[31]From the credited testimony of Phillips. I credit this testimony over Maue's denial despite the fact that Phillips had a nervous breakdown. Other aspects of Phillips' testimony are perfectly reliable and credible and there is no reason to believe, from the record, that Phillips' testimony in this regard is not reliable.

Heretofore I have referred to the incident in which Foreman Hugh Salsbury spoke to employee Bach at the terne plate in which Salsbury stated that if the Union got in there would be a chance that personnel with more seniority would "bump" the people situated, such as Bach, out of their jobs. Bach testified that this type of conversation occurred several times before the election. Salsbury also spoke to employee Richard Bishop. This was about October 31, 1966. At that time, Bishop had completed testifying for the Union in the representation case. Salsbury said that Bishop had lied about him and had jeopardized Salsbury's family. Salsbury said that he was going to get even with Bishop. He told Bishop that this was not a threat, it was a promise.[32]

During the Union's organizational campaign employee Joseph Bach had a conversation with Superintendent Herman Zimmel. Zimmel told Bach that if the Union came in Bach's chances of working there would be damaged and that his job would be claimed because of his condition. Zimmel was referring to a physical condition from which Bach suffered.[33]

Bach had a similar conversation with Vice President James Snyder. This conversation took place around Thanksgiving 1966 at the seam welder, a ma-

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[32]From uncontroverted, credited testimony of Bishop. Salsbury did not testify.

[33]From the credited testimony of Bach. Zimmel could not remember any specific conversation he had with Joseph Bach but he testified that he could have talked to him. He did not specifically deny what Bach had testified to.

chine which is used at the terne plate. During this conversation, which concerned the Union, James Snyder said that if the shop had been a union shop Bach would not have been able to get work there because of his physical condition."[24]

Earlier in this Decision I have set forth the incident in which Foreman Harry Stark told employee Charles Smith that the coming of the Union was a rough business and it was not going to do anybody any good. Stark also stated that employees would be "getting pushed around" if the Union instituted seniority in the plant. Stark went on to say that certain people had their eyes on Smith's job and that certain welders would have preference to Smith's job as far as seniority was concerned; that Smith's job would not be guaranteed.

(p. 13)

I find and conclude that the foregoing incidents constituted threats of discharge and layoffs which threats constitute interference, coercion, and restraint within the meaning of, and are violative of, Section 8(a)(1) of the Act.

4. Promises of benefits

I have referred above to the occasion approximately a month before the election in which Night Foreman Pajak had a conversation with employee Scherff. This conversation pertained to Scherff's

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[24]From credited testimony of Bach. James Snyder did not deny this incident.

chances of beng promoted to a tester. Pajak said that if the Union got in Scherff's chances of being promoted to such a position would not be too good. Pajak stated that if the Union were selected he did not think Scherff would become a tester. This was because Scherff's seniority was not sufficient; that there were employees there who were older than he was in point of time of service to the Company who were already testing and that his seniority would not be sufficient. Pajak further stated, however, that if the Union did not make it Scherff's chances of becoming a tester would be better because the Respondent was going to start giving jobs to employees whom they wanted in the jobs rather than those who were merely senior. Pajak said that this was so because if the Company did not give these jobs to their better employees, the next time the Union made an attempt to get in the Union would make it easily.[35]

On January 13, 1967, Gerald J. Snyder, president of the Respondent, sent a letter to the employees. In this letter Snyder attempted to answer some of the questions that had been asked him by employees at an earlier meeting. Among the items covered in the letter about which questions had been asked were "How does our other benefits compare with other companies in the area?"

The letter stated that the Company had recently sent out questionnaires to determine this and to date, out of 43 questionnaires sent out, 20 were returned. This survey proved that in the matter of wages, in-

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[35]From credited testimony of Scherff which I have heretofore credited over the denials of Pajak.

surance, and hospitalization the Company was far superior. However, at the end of the paragraph which contains this information, the letter went on to say, "We have realized that we were a little low on this [paid holidays] but had planned on correcting it, and in the normal course of events it will be corrected."

Because of the tenor of the letter and the circumstances surrounding the campaign conducted by the Respondent, the only meaning that can be given, "due course of events" could mean, "if the Union were to be defeated."

One further incident promising benefits occurred. This was in a speech given by Gerald Snyder on January 18, 1967. This was on the day of the election, just before the election was held. Snyder told the employees assembled that the election would be overwhelmingly in favor of the Respondent. He then proceeded to tell the employees that they would get two additional paid holidays, a 15-cent-an-hour-raise, and he would see about forming a grievance procedure or a grievance committee. Snyder further mentioned that an annual review of wages had been conducted by the Respondent and that the Respondent usually gave out wages as a result of this review. However at the time in ques-

(p. 14)

tion, as a result of the review they found they could give the workers a raise but were afraid to do so because if they did so they would be faced with unfair labor practice charges by the Union. He then told

the employees that how they voted that day could determine their future."[36]

The foregoing incidents are clearly examples of promises of benefits to the employees made in order to persuade them to drop their union affiliation and to vote against the Union in the forthcoming election. Under these circumstances they constitute interference, coercion, and restraint in violation of Section 8(a)(1) of the Act. I so find.

(p. 15)

6. Warnings to close plant

Early in the union campaign, on approximately October 10, 1966, Gerald Snyder held a meeting of the employees. At that meeting there was discussion of the fact that the union had been organizing the plant and Gerald Snyder said that he was sorry to see this happen. He then went on to ask for questions from the employees stating that he would write them down and answer them at a later date. The first question that was asked was asked by an employee, James J. Scott. Scott asked what had happened to the Respondent's Birmingham, Alabama, plant. Before Gerald Snyder was able to answer the question James Snyder interrupted. He said that the Alabama

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[36]From the testimony of employees Bence, Bishop, and James Scott. Although Snyder testified that he did not deviate from the written speech on that day, which speech was introduced into evidence, I find that from the testimony of these employees, some deviations must have been made. Accordingly, I do not credit Snyder's statement that the speech as written was delivered in toto.

plant was forced to close because of the unreasonable demands of the Union, that the rates that they asked were so high that the operation ceased to be profitable. Then he went on to state that he did not want to see happen at the Buffalo plant what had happened at the Birmingham plant. [37]

The General Counsel insists that this statement by Gerald Snyder constituted a threat of loss of jobs and created an impression that the inevitable effect of unionization would be a closing down of the Buffalo plant. However, I do not find this to be so. The mere expression of James Snyder to the effect that he did not wish to see the same thing happen at the Buffalo plant as happened at the Birmingham plant falls far short of the creation of an impression that the inevitable effect of unionization would be plant closure. [38]

However, just before the election, on January 12, 1967, Gerald Snyder, as president of the Respondent, sent a letter to the employees of Snyder Tank. This letter concerned the Union's campaign promise of job security for the employees if the Union were to be selected as their bargaining representative. The letter termed this promise by the Union a "cruel hoax." In the next paragraph the letter went on to say:

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[37] From the credited testimony of a number of employees, among them James J. Scott, Dubke, Burke, and others. Neither James nor Gerald Snyder denied this occurrence.

[38] See **Trent Tube Company, Subsidiary of Crucible Steel Company**, 147 NLRB 538, 541; **Jacob Brenner Company, Inc.**, 160 NLRB 131, 136 — 137.

One of the outstanding examples of how false this claim is appeared in the Toledo, Ohio newspapers sometime ago, when 6000 union members of the United Auto Workers, at Electric Autolite lost their jobs. Why? Simply because the company could not continue to operate under the union contract thus forcing the company to close down.

In another paragraph the letter stated:

Another good example is the York-Hoover Body Corporation, in York, Pennsylvania, which was under contract with the United Auto Workers. This Company had been in business for over 100 years, and at one time had over 600 employees. After many strikes, the last one lasting 25 weeks, and with their work force down to approximately 250 employees, they were unable to operate profitably under the union contract and sold out. The Company that is now operating the plant has an average of 150 employees.

(p. 16)

Another good example is where the "job security" of 350 union members at one of the Wilson Packing Plants vanished in thin air when the union rejected a company proposal to keep the plant operating.

Again, not too long ago, a union through preaching "job security", won an election at Peerless Woolen Mills. After the election, the union president stated: "Job security and the uncertainty of seniority rights was the chief reason for the union victory." This certainly

should sound familiar to you here, since it seems to be the theme song of the union that wants your vote at the election. But what happened to the "job security" of the Peerless employees? The union won the election in August and the plant was out of business in October, and 1700 employees lost their jobs.

Another example is the famed **Darlington** case, where the union won an election and the Company closed down causing over 1000 employees the loss of their jobs. The union filed charges against the Company, but the Supreme Court of the United States held the Company could close down for any reason whatsoever so long as it was not done to "chill" union organizing at other plants of the Company. It was later determined by the National Labor Relations Board that it was not done for this reason so the employees lost out.

But we don't have to look outside Buffalo to see how phoney the sales pitch of "job security" is. You all know what happened practically next door to us at Penn-Dixie, and no doubt you have read recently where the Clarence Plant of National Gypsum after being on strike for over six months informed the union of their plans to discontinue manufacturing operations. In addition to these there was the close down of the Wickwire-Spencer plant with a loss of 1500 jobs; American Locomotive in Dunkirk with a loss of 600 jobs; Spring Perch which sold out to another company which now operates at a limited capacity. I am also sure that you are all aware of what happened to the Herald-Tribune which

was forced to close because of unreasonable union demands. (Herald-Tribune, New York City newspaper)

WHAT HAPPENED TO THE JOB SECURITY OF ALL THESE PEOPLE? Instead of protecting them the unions were instrumental in their being out of work — with no jobs to go back to. We are not saying we will go out of business. We won't so long as we can make a reasonable profit. What we are saying is that much bigger companies than we have been forced out of business through excessive union demands. When they did the employees lost their jobs. You judge from this just how the unions can guarantee you job security.

Then the letter states that the Respondent, not the Union, gives job security and a successful future for Snyder Tank and security for the employees would be accomplished by the Company being able to continue selling quality tanks to their customers as cheaply as the competitors can.

While it is true that the Respondent, in the foregoing letter, after citing all of the instances in which plants closed down after unionization stated that they were not saying that they would go out of business, nevertheless the letter created the impression of the inevitability of such if the employees selected the Union as their bargaining agent. These warnings

(p. 17)

of dire consequences of unionization are not overcome by the mere statement that the Respondent had no intention of going out of business. The in-

evitable result and the inevitable effect of the letter was definitely to create the impression that the Company might go out of business if the Union were to come in the plant. Accordingly, I find and conclude that the letter was a coercive prediction that the Respondent would possibly go out of business if the Union were to be successful in their campaign. Such a prediction is coercive and violative of Section 8(a)(1) of the Act. I so find.

In August 1967, employee John Bence went to Gerald Snyder's office to find out why he did not get a merit raise as did many of his fellow employees. Snyder told Bence that his work was average which would normally entitle him to a merit raise, but that he was making too much per hour for the job he was performing. During the conversation Bence told Snyder that he was not rebelling against him that he only wanted to bargain with him and Snyder replied, "well, if I have to sell this place out I will to fight this Union." Then Bench replied in the affirmative and said that he knew that Snyder would do that even if the Union did get in, Snyder would still fight it. Snyder answered "you're damn right."[39]

Although the foregoing conversation occurred a number of months after the Union was defeated in the election, the Union's battle to gain recognition was still being pursued by the Union. Charges were pending before the Board in the instant proceeding as were the objections to the election. It is clear that Snyder's remarks to Bence constituted a threat to

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[39]From the credited testimony of John Bence. Snyder did not, in his testimony, deny this conversation with John Bence.

go out of business if the fight against the Union made this necessary. Accordingly, I find and conclude that this is a coercive statement in violation of Section 8(a)(1) of the Act.

Around the first of October 1966, employee Howard Stutz had a conversation with Shipping Foreman Maue about the Union. During this conversation Maue told Stutz "they'd probably shut the place down rather than have a union."[40]

Sometime around the end of October, or perhaps the beginning of November, employee John Pates had a conversation with Maue. Maue told Pates that the Snyders would close the doors as they did in Alabama if the Union were to be successful in its drive."[41]

It is clear that the conversations between Maue and Stutz and Maue and Pates as above outlined constituted clear predictions that the Respondent would close its doors if the Union were to be successful. That such a prediction is violative of the Act requires no citation. I find, accordingly, that by these statements, Maue engaged in interference, coercion, and restraint violative of Section 8(a)(1) of the Act.

(p. 18)

Employees Richard R. Bishop and James J. Scott

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[40]From the credited testimony of Stutz. Inasmuch as I have not credited Maue's other testimony, I do not credit Maue's version of the conversation between Stutz and himself.

[41]From the credited testimony of Pates.

testified that they saw on the bulletin board before the election a newspaper clipping to the effect that the Clarence Plant of the National Gypsum Company was going to end production. This article stated that the plant was closing down after a strike over terms of a new contract. The strike lasted 6 months and resulted in an impasse after which the plant was closing down. This newspaper article was from the Buffalo Evening News of January 4, 1966.

Although the General Counsel contends that this constituted a threat to close down the Respondent's Buffalo plant, the facility here in question, I cannot find it to be such a threat. In the first place, the news article was taken out of the daily paper which was circulated in the Buffalo area in which all of the employees of the plant both lived and worked. Therefore, there was nothing new in this posting by the Respondent that the employees did not already know from their reading of the local paper. With nothing more being added, I cannot perceive that the article, in and of itself, is a prediction that the Respondent would close its plant. I therefore find that the posting of this article did not violate Section 8(a)(1) of the Act.

7. Attempt to bypass the Union

In October 1966, the Respondent conducted an opinion poll among its employees concerning wages, hours, and other working conditions. This poll was conducted among both the employees on the day shift and on the night shift. It was similar to a poll taken by the Company in 1963 at which time the

United Steelworkers were attempting to organize the Respondent's plant."

The poll was taken by Gerald Snyder, calling the employees to the lunchroom where the poll was conducted by an outside firm.

The poll itself consisted of 86 multiple choice questions concerning such items of working conditions as work station temperature, ventilation, lighting, work space, tool and equipment, toilets and washrooms, lockers, lunch area, safety program, work requirements, receipt of orders from superiors, overtime, work planning, interruptions, rush jobs, relations with supervisors, employee complaint, handling, profit sharing, pay and pay raises, comparison with other companies, job security, employee welfare, and suggestions. The multiple choices, though fitted to each individual question, ran the gamut from the equivalent of excellent to bad.

The results of the poll were published and compared with the 1968 poll. With the publication to the employees, Respondent had a comment to make as to each question showing what the Respondent had done or planned to do with regard to each matter in question. In addition, the results were accompanied by a memorandum to the employees which read as follows:

> After studying the results of this poll I think you will have to agree that contrary to what the

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"From the credited, uncontroverted testimony of employees Bishop and Scott.

> Union is trying to make you believe, the majority of the employees here feel that Snyder Tank is a pretty good company to work for. We urge you to study the results because if you do

(p. 19)

> we know you will agree with us. It also shows there has been an improvement here since the last poll was taken.

The above memorandum was signed by Gerald Snyder.

It should be noted in connection with this poll that nowhere in any of the 36 questions or in the results was the Union mentioned. Nowhere in the poll was there any request to the employees to express their union sympathies or desires. Nowhere in the poll was any employee asked to identify himself or sign his name. The General Counsel contends that the taking of the poll and the publishing of the results thereof constitute a bypassing of the Union and, therefore, further constitutes a violation of the Act. However, as in so many instances in his brief, the General Counsel fails to point out or even offer to show the respect in which this poll constituted a bypassing and therefore a violation of the Act. Nevertheless, I tend to agree with the General Counsel's contention.

The poll did not mention the Union except that Respondent stated that despite the claims of the Union the majority of employees thought the Respondent's plant was a good place to work. This would indicate that the purpose of the poll was not

so much to inquire into the working conditions of the employees with the thought to improve them, but rather to show the employees that without the Union they could express their thoughts and their desires with regard to wages, hours, and other working conditions and have some of their wishes granted voluntarily by the Company without the intervention of the Union. This is amply demonstrated by the comments the Respondent made with regard to each of the 36 questions, in which comments it stated what it was going to do or what it had done with regard to each of the items. All of this had the effect and was ostensibly for the purpose of discouraging the employees in their adherence to the union cause. But, additionally, it constituted a bypassing of the Union because it demonstrated to the employees that they could get the benefits they wanted without the assistance of the Union. At this time, the Union was already well in the picture. It had not only demanded recognition and bargaining but had filed a petition for representation. The effect of the poll, therefore, was no different than the often-experienced situations in which an employer deals directly with his employees once the union is in the picture.

Accordingly, and by reason of all the foregoing, I find that by conducting the poll and publishing the results thereof, together with the memorandum to the employees, the Respondent attempted to bypass the Union in derogation of the Union's rights, and therefore violated Section 8(a)(1) of the Act.

8. Withholding of wage increases

In the poll, taken as set forth in the section above,

item 30 of the questions asked was, in effect, "Company policy with regard to raises is—a. very good; b. okay; c. not too good; d. pretty bad." The results of this question show the majority of the employees polled felt that the wage policy was not too good or pretty bad. In its comments on this particular question, the Respondent posted the following:

> As we have told you in the past, we make financial reviews between November and January each year and have granted annual wage increases. We did the same this year and we felt that as a result we could have satisfied everybody, however, as you all know, when a union

(p. 20)

> is trying to organize a plant, we could be charged with an unfair labor practice if we had put the increases and benefits into effect during this period.

In much the same manner, in his speech to the employees on the day before the election, Gerald Snyder stated that they had reviewed the wages of the employees and had found that many of them had wage increases forthcoming but that the Respondent could not give the wage increases at that time because of the Union being in the picture and the possibility that if the wage increase was given the employer would be charged with an unfair labor practice.

The test of whether conduct violates Section 8(a)(1) of the Act is whether a reasonable tendency of an action is to interfere with, restrain, or coerce em-

ployees in the exercise of their Section 7 rights. Here the Respondent's action must be judged by the manner in which it would normally be interpreted by the employees. At the time the poll results were published and Gerald Snyder made his announcement in the speech to his employees the day before the election, the employees were well informed that the Company was hostile to the Union. In this atmosphere, the announcement that the employees did not get wage increases even though wage increases were due them because the Union was in the picture and the Respondent did not want to be charged with unfair labor practices, had the affect upon the employees of inducing them to believe that the wage raises were withheld because the Union was in the picture and would not be granted until the Union was defeated in the election. Accordingly, the Respondent's actions constitute interference, coercion, and restraint within the meaning of Section 8(a)(1) of the Act.

9. The antiunion petition

On January 27, 1967, employee James D. Lewis drafted and thereafter circulated a petition addressed to the Regional Director of the Board which read as follows:

> We the employees of Snyder Tank Corporation, feel that we had a democratic election on January 19, 1967 and now we have been told that the U.A.W. union has asked to represent us even though they lost the election. We want you to know that we have been told of all the objections and they are not the truth. None of

us were promised or forced by the company in any way. We do not feel that the election should be thrown out. They lost and lost fair.

Some of us who have signed this may have voted for the company; some of us may have voted for the union; and some of us may have signed union cards for one reason or another.

We want you to know that those of us who have signed union cards and who have signed this letter, want to have our cards returned to us.

Sincerely,

The foregoing petition was signed by many of the employees. Not a few of the employees who signed were among the employees who signed union authorization cards.

(p. 21)

According to Lewis, he approached James Snyder, vice president of the Respondent, and asked if it would be all right for Lewis to write up a petition and send it around. Snyder answered that it wasn't up to him, it was up to Lewis. After speaking to Snyder, Lewis went home and wrote up the petition which was typed by Lewis' wife's cousin. She was not employed by the Respondent. Lewis stated on the witness stand that Snyder gave him some advice as to what to do. Lewis further testified, without contradiction, that since there was not enough room on the first page of the petition a second petition was made up in the Company's office. Lewis asked Snyder about it and asked him if he could use the machine to make a photostat of the original so that

the second copy would be an exact duplicate of the first. This was not during working hours. It was after working hours and one of the girls in the office evidently operated the machine. After the petition was signed by the various employees, Snyder told Lewis where to send the petition. Lewis further testified that Snyder told Lewis that the latter could not circulate the petition around the plant on company time.

While Lewis was circulating the petition to the employees on the terne plate he told the employees to read the petition, asked them to sign if they wanted to and explained that they did not have to sign if they did not want to. At that time Foreman Hugh Salsbury stated to the employees present to "make sure you know what you are reading before you sign it."[43]

James Scott, a former employee, testified that he was working at his machine when he first saw the petition. It was in the possession of James Lewis who was circulating the petition during working hours. When Scott first noticed Lewis he saw the latter coming up the aisle and stopping with a sheet at each person working along the aisle of the back shop. Finally Lewis arrived at Scott's station and asked Scott if the latter wanted to see it. Scott read it and told Lewis that he did not want to sign it. At the same time Scott saw both Foreman Plarr and Superintendent Zimmel. Plarr was at his desk in the shop and Zimmel was following Lewis up the aisle.

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[43]All of the foregoing from the uncontroverted testimony of Lewis.

He stayed behind Lewis during the entire time that Lewis was circulating the petition, watching Lewis circulate the petition, and asking the employees to sign. Scott estimated that Zimmel was between approximately 25 to 30 feet from Lewis all the time the latter was circulating the petition. Pfarr sat at his desk and did nothing although he watched Lewis."

Apparently employee Glore was also involved in the petition movement. At that time, Glore asked Zimmel about the petition that he, Glore, and his fellow worker (evidently Lewis) were thinking about getting up. Zimmel said that if the employees signed the petition and there were enough signatures on it, it might help kill the charges of an unfair labor election and make the election legal."

(p. 22)

A couple of days after Lewis prepared the petition and after a number of employees had signed it Foreman Pfarr engaged Lewis in a conversation. Pfarr asked Lewis if the latter had let everyone read the petition including Scott and Scott's helper. Lewis answered yes that he had let everybody read it. Then Pfarr asked if Scott had signed the petition. Lewis answered that he had not."

While he was circulating the petition to the employees on the terne plate Lewis was approached by Foreman Hugh Salsbury. Salsbury stated to the em-

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"From the uncontroverted testimony of James J. Scott.

"From the uncontroverted testimony of Glore.

"From the credited testimony of Lewis.

ployees that they should make sure what they were reading before they signed the petition. At another time when Lewis was circulating the petition, employee Joseph Bach was approached by Lewis. Foreman Salsbury told Bach that he would not sign it if he were Bach because he did not know what he was reading. Then Salsbury read the petition. All of this was during working time."

While it cannot be concluded from the foregoing that the Respondent actually sponsored the petition, nevertheless, it did, to a degree assist in the preparation in the advice given by James Snyder and in his giving permission to use the office machine of Respondent to prepare to use the office machine of signatures. Additionally, it is apparent that though Snyder did tell Lewis not to circulate the petition on company time, condonation of circulation of the petition was given by permitting circulation during working hours in the presence of various foremen and Superintendent Zimmel who followed Lewis as the latter solicited employees at their work stations. Moreover, Zimmel's statement to the effect that the petition might overcome the effect of the union-filed objections, constituted encouragement to proceed with the drafting and circulation of the petition.

I conclude that these actions and by this demonstrated permissiveness the Respondent gave the impression that the petition was being circulated with its approval. This constituted interference in violation of Section 8(a)(1) of the Act."

"From the credited testimony of Lewis and Bach.

"See River Togs, 160 NLRB 58, 60—61.

(p. 23)

C. The Discharges

1. Douglas Gravelle

Gravelle was hired by the Respondent in May 1968 and was assigned to the back shop as a machine operator on the night shift. At the time of the events herein, Gravelle operated a machine called the "shear." His immediate foreman was Raymond Pajak, his superintendent was Herman Zimmel. Before the advent of the Union, Gravelle had never been reprimanded for his work or his conduct as an employee. In fact, in the short space of time of his employment, Gravelle had received two 10-cent-

(p. 24)

per-hour wage increases and had been complimented on several occasions by Pajak for the manner in which he had performed his work. Also, when Gravelle's brother was being released from military service, Gravelle asked Pajak for a job for the brother and Pajak told Gravelle that if his brother was as good a worker as Gravelle the brother would have no trouble at all."[a]

About the middle of September 1968, Gravelle called the union hall and told a union representative that some of the employees at Respondent's plant were interested in having the Union represent them.

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[a]From the uncontroverted testimony of Gravelle.

As a result, a business representative was dispatched to meet with Gravelle. From this meeting began the union organizing campaign of the Respondent's employees. On September 19, Gravelle signed a union authorization card at his home where he met the union representative and also received many additional cards. These cards Gravelle either distributed to other employees personally or gave to other employees to distribute. Thus, Gravelle was directly responsible for the Union's coming into the picture at the Respondent's plant.

In addition to the foregoing activity on behalf of the Union, Gravelle attended the Board hearing in the representation proceeding and testified on behalf of the Union. Also, some time in the organizing period, Gravelle was accused by Gerald Snyder, basically on the complaint of employee George Glore, of threatening plant personnel. This Gravelle denied stating that he had merely told employees the purpose of the cards when he made distribution. It should be noted, in connection with Glore's complaint, that Glore told Snyder that he thought the Union had planted Gravelle in the plant."

Additionally, during the union campaign, employee Edward Waz had occasion to discuss Gravelle with Foreman Raymond Pajak. Pajak told Waz, in substance, that now that Gravelle was trying to get the Union into Respondent's plant he was getting "too big for his britches." Another time,

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"Accordingly, I do not credit Gerald Snyder's claim that he did not know that the alleged threats were made in connection with union activity of Gravelle.

Pajak told Waz that since Gravelle had been trying to get the Union in, Gravelle was going to try to tell how to run the plant."

On the night of November 30, 1966, Gravelle was working on the shear with Kenneth Hinderliter, a fellow employee. The machine area where Gravelle was working was cluttered with wooden blocks which were used in the stacking of steel plates which in turn were used in the manufacture of tanks. (The blocks are approximately 2-to 3-feet long and are made from 2 by 4 or 3 by 3 lumber, and some smaller sizes, cut up into the necessary lengths.) When Gravelle and Hinderliter were working that night the blocks were getting in their way. Gravelle took some of the blocks and kicked others into the aisle alongside the shear to get them out of the way. Because the aisles are used to move material and as walkways, Gravelle was planning to pick up the

blocks so that they could be moved out of the plant by means of the overhead crane to the outside where they could be disposed of by burning. Gravelle was about to go up the aisles to get the crane when Pajak came over to Gravelle and asked the latter, "What did you throw the blocks in the aisle for."[6]

When Pajak asked what Gravelle had "thrown"

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[5]From the uncontroverted testimony of Waz which I credit.

[6]This version of the block piling in the aisle from credited testimony of Gravelle. The only eye witness was Kenneth Hinderliter whose version did not differ materially from Gravelle's.

the blocks into the aisle for, Gravelle answered that he had not thrown them. Upon that answer, Pajak turned to Hinderliter and asked the latter if he had thrown the blocks in the aisle. Hinderliter denied he had thrown the blocks. After some further discussion, Pajak said something to the effect that he was sick of the whole business and that Gravelle and Hinderliter were going to have to see Superintendent Herman Zimmel the following morning.

Later that evening Gravelle again spoke to Pajak and asked why Gravelle had to see Zimmel. Pajak answered that it was because Gravelle had thrown blocks. Upon Gravelle's asking Pajak if the latter saw Gravelle throw blocks, Pajak answered in the negative. Thereupon Gravelle, who claimed the incident had made him nervous, asked to go home. Pajak consented and signed Gravelle's punched out card.

Some time during that same evening, Kenneth Hinderliter and Pajak conversed about the alleged block throwing. Again Pajak asked Hinderliter, "Who threw the blocks in the aisle."

When Hinderliter demurred, Pajak told Hinderliter that the latter had his job to think about. This persuaded Hinderliter who then told Pajak that Gravelle threw the blocks.

The next evening about 4 o'clock Gravelle went to see Zimmel. Zimmel asked Gravelle why the latter threw blocks in the aisle. Gravelle denied he threw the blocks and reminded Zimmel that Pajak had admitted to Gravelle that Pajak did not see

Gravelle throw blocks. Then Gravelle asked Zimmel what was going on and why Gravelle was being blamed for everything that was happening. Zimmel answered that he had some evidence that Gravelle had thrown the blocks in the aisle. Upon that, Zimmel told Gravelle that the latter was to be suspended for 2 or 3 days pending investigation of the matter and that Zimmel would contact Gravelle by phone or mail and tell the latter the outcome and the decision."[57]

The same evening that Gravelle was suspended, Kenneth Hinderliter spoke to Superintendent Zimmel who told Hinderliter that President Gerald Snyder wanted to see him."[58]

(p. 26)

Upon arrival at Snyder's office, they found Snyder, John Sullivan, labor relations advisor to the Snyders, and Hinderliter's father, a tow-motor operator in the plant. Hinderliter related to those present his version of what had occurred the night before. Among other things, he told Snyder and Sullivan at that meeting that there had been blocks thrown by other people in the plant, but that there were never as many blocks thrown before at any one time.

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[57]From the credited testimony of Gravelle which testimony did not differ materially from that of Zimmel as to the meeting.

[58]According to Zimmel's testimony, Hinderliter told Zimmel that Gravelle not only threw the blocks in the aisle but was laughing about it as he did so. However, Hinderliter did not so testify.

With regard to the amount of blocks placed in the aisle on the night of the incident, James Stuhr, a former employee of the Respondent, testified that on that night he was wheeling material through the aisle in question. Three different times during that evening he fell over the aisle blocks and was forced to remove the blocks each time in order to continue with his two-wheel buggy. Stuhr, however, did not see who placed the blocks in the aisle.

In any event, on the morning of December 5 Gravelle called Zimmel by phone and asked the latter whether Gravelle was to return to work. Zimmel answered that the investigation had not yet been completed but that Respondent would let Gravelle know in 2 or 3 days. The very next morning, however, December 6, Gravelle received a letter in the mail which informed him that he was terminated.

That there were other incidents involving the placing of obstructions in the path of material movers is shown in the record. Thus, some time after the union organizing campaign started, employee Galbo was moving some material up the aisle on a two-wheel dolly when someone threw a block under the wheel. Foreman Pajak observed the incident, and just smiled saying nothing and taking no action."

On another occasion, during the week of November 23, 1966, employee Wax placed some shelving out in the aisle. Some employees were wheeling material up the aisle and could not get by. Pajak asked employee Dubke why the latter was blocking the

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"From uncontroverted testimony of Douglas Gravelle.

aisle. When Dubke denied that he was blocking the aisle and pointed to Waz, telling Pajak that Waz was the culprit, Pajak left taking no action.

In another incident which occurred in September 1966, employees Dennis Gravelle and Gary Scherff were working together on a press when Pajak came alongside their machine with a tow-motor. Pajak left the tow-motor there and when he was gone Scherff placed blocks under the wheel of the motor. When Pajak returned he said that if there were any blocks under the wheel Scherff could go home. Then Pajak mounted the tow-motor but he could not move it because the blocks were under the wheel. He turned to Scherff and told the latter to go home. Pajak then went away with the tow-motor and when he came back Gravelle told him that he'd have to have somebody to work with. About 10 minutes later Scherff returned and Gravelle told him that he had thought that Scherff had gone home. Scherff stated that he went to get coffee and thereafter Scherff stayed and worked with Gravelle. Pajak saw him there and went away and that was the end of the incident. According to Scherff the whole incident was taken in a joking manner."

(p. 27)

Still another incident occurred. Two or three weeks after Gravelle was discharged Waz was fit-

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"From the credited testimony of Dennis Gravelle and Gary Scherff. Pajak testified that there was nothing to the incident because the tow-motor was not moving at the time. However Pajak did admit that he did not report this incident to the front office.

ting tanks. In order to do the job properly a section of the tank had to be burned out. In order to get the job done, while he was waiting for someone to burn the tanks out, Waz placed the tanks out in the middle of the aisle. Pajak wanted to know what he was doing. Pajak said to Waz something to the effect that Waz was trying to lose his job like Gravelle did by putting tanks in the aisle. Then Pajak had moved them out of the aisle and that was the end of the incident. No action was taken."

It should be noted in connection with the alleged block-throwing incident that although Gerald Snyder gave the final order to discharge Gravelle, Gravelle was never asked to give his version of the incident. Moreover, although Snyder stated that there were others who had been discharged for cause within the period of time near the time that Gravelle was discharged, only in two incidents were there discharges without prior warning. In one of these incidents, the employees involved used certain four-letter words in defying his foreman. In the other incident, the employee involved punched another employee's timecard at a time when the other employee was not present in the plant for work. In all other cases, the Respondent admitted that it had given warnings and had not discharged employees on their very first infraction.

It cannot be denied that placing obstructions in the rather narrow aisles of the plant was a dangerous practice. Employees using dollies and tow-motors could readily be injured upon impact with

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"From credited, uncontroverted testimony of Waz.

the obstructions. Thus, under ordinary circumstances, the placing of obstructions in the aisles would constitute an offense calling for some disciplinary action on the part of Respondent's officials. However, as can be readily deduced from the record, Foreman Pajak treated other infractions involving the placing of obstructions in the aisles and walkways in a rather cavalier fashion. It may be argued that the reason for this was the other offenses were minor and that the offense of Gravelle was major in impact and involved more than a mere temporary blocking of the aisle at one time. Thus, as former employee Stuhr testified, at three different times during the evening he was forced to stop moving material in order to clear the aisles to make passage possible.

Thus, if Gravelle placed the blocks in the aisle for the purpose of obstructing passage of material carriers, disciplinary action of some sort might have been warranted. But, here we have an employee whose record up to the time of the incident was exemplary. He had received wage increases and several compliments on job performance during the short span of time of his employment with the Respondent. Suddenly, for an infraction involving horseplay, which theretofore had been lightly treated, this employee was suddenly not warned, not disciplined by reprimand as was the Respondent's admitted normal procedure, but was discharged without being given an opportunity to explain his action. And, this occurred at a time when the heat of the election campaign was at its highest and after Respondent had full knowledge of Gravelle's activities on behalf of the Union. The disparity of the treat-

ment given Gravelle as compared to similar, although perhaps more minor offenders, is emphasized by the fact that only two other employees had been

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discharged without warning. Of these two, one had cursed out a supervisor in defying the latter's authority and the other had dishonestly punched in a fellow employee's timecard at a time when the other employee was not even in the plant.

Therefore, in view of the Respondent's vehemently expressed opposition to the unionization of its employees, the other unfair labor practices found to have been committed herein, Gravelle's excellent record as an employee and his open support of the Union, and the disparity of treatment received by Gravelle compared to other employees convinced me that Gravelle's misbehavior, if, indeed, it was that, was seized upon by the Respondent as an opportunity to rid itself of a strong union adherent and that the reason given for Gravelle's discharge was pretextual, the true reason being his union activity.

Accordingly I find and conclude that the Respondent discriminatorily discharged Douglas Gravelle in violation of Section 8(a)(3) and (1) of the Act.

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(p. 32)

D. The Refusal to Bargain

1. The appropriate unit

In accordance with the Regional Director's De-

cision and Direction of Election, dated December 20, 1966, I find and conclude that all production and maintenance employees, including warehouse employees, employed at the Respondent's Buffalo, New York, plant, excluding all office clerical employees, professional empoyees, truckdrivers, truck mechanics, and supervisors as defined in the Act constitutes a unit appropriate for the purposes of collective bargaining.

The General Counsel would exclude, and the Respondent include, in the unit herein found appropriate, Donna and Margaret Bellanca, maids or cleaning women whose main duties are to straighten out and clean up the offices of the Respondent. These two women are employed part time, working only Sunday and Wednesday evenings, they do not punch timeclocks nor do they have any contact or relationship with other employees in the production or maintenance unit. Moreover, they are related to the Snyders who are the top management of the Respondent corporation. I find and conclude that the employment interests of these two cleaning women differ from those of the rest of the employees in the unit and that they are, therefore, excluded from the unit. Moreover, the Respondent did not include either of these two individuals on the eligibility list for the election.[65]

I further find and conclude, in accordance with the Regional Director's decision, that all of the working foremen are supervisors as defined in the

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[65]See J. Heber Lewis Oil Company, Inc., 123 NLRB 1115, 1116; Helms Motor Express, Inc., 107 NLRB 132, 135.

Act and are therefore excluded from the unit. Additionally, the parties stipulated the names of truck-drivers as they appear on the Respondent's payroll lists for the period of October 9, 1966. These drivers, seven in number, are also excluded from the unit herein found appropriate.

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2. The majority

With the exclusion of the above individuals from the payroll list, it would appear that there remains on the list 151 names. Therefore, 76 authorization cards are required to support the Union's majority claim. The General Counsel introduced at the hearing 81 authorization cards which were duly identified. However, the Respondent contends that a sufficient number of cards were obtained by fraud or were otherwise defective so as to eliminate the Union's majority. I shall treat with these contested cards individually.

James Stuhr: Stuhr testified that he had signed the card after having been told by other employees who were soliciting the cards that Stuhr's brother had signed and because pressure had been put on him by reason of his brother's relationship through marriage to the Respondent's management. However, Stuhr, did not detail what his pressure was other than the foregoing and he further related that the pressure had been put on him in a joking manner. Stuhr further stated, in his testimony, that he had read the card before he signed it. In addition, Stuhr admitted that he had not told the Board agent

who had investigated the case that he had been pressured into signing the card.

I find nothing in the foregoing which would demonstrate that Stuhr signed the card through misrepresentation of the type which the Board has before held to be defective or fatal. Nor was there any coercion of the type which would render the card defective. Accordingly, I shall count Stuhr's card in assessing whether the Union did possess a majority on the date of its demand.

Charles Hartman: When asked what was said to him when he received his card Hartman testified, "Well, they were talking about getting an election for — that it was, the card it was for, to get an election to try to get a Union down there."

However, Hartman also testified that he read the card before signing it. I do not find that even crediting Hartman fully, that it was expressed to him, either explicitly or indirectly, that the card would be used only for an election. The testimony is very meager and, in view of this and the fact that Hartman read the card before he signed it, I find that under all the circumstances there was no assurance to Hartman that the card would be used for no purpose other than to get an election."[46]

Chad Troup: Troup testified that he received his card at a meeting at the union hall, that he filled it out and signed it there and gave it back to the union representative. He further testified that before he

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[46]See Levi Strauss & Co., 172 NLRB No. 57 at p. 5.

signed the card, the union representative said to Troup "to fill this card out was for getting a vote, so you could vote for the Union to come in."

However, upon redirect examination, Troup stated that he could not remember exactly what was said to him at the union hall before he signed the card. Then, because he said his recollection was exhausted, General Counsel presented him with his pretrial affidavit for the purpose of refreshment of recollection. After his recollection was thus refreshed, Troup testified that he was told at the union

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meeting that the Union could get recognition for the plant with the cards and if he wanted to sign one he could and if he didn't want to sign one he didn't have to. Troup also stated that he read the card fully before he signed it.

In the light of all of the foregoing, I do not find that the import of Troup's testimony is that it was represented to him in substance, that the card would be used only for an election. Accordingly, I accept Troup's card as a valid union designation.

John Szmalec: Szmalec spoke only broken English, and, at best, his testimony is difficult to understand. In any event, there was nothing in his testimony concerning the subject of election. He testified, in substance, that a man bothered him to sign the card that he knew nothing about it. Respondent contends that Szmalec signed only to bring an end to being bothered. But, I find no precedent which would render a designation invalid merely because

the signer was "bothered" into signing. There is no testimony here that Szmalec was coerced or threatened into signing. Moreover, at best Szmalec's testimony was limited in effect since he admitted that he did not remember just what was said to him by the solicitor. Accordingly, I conclude that Szmalec's card is a proper, valid designation.

Bernard Carney: Carney testified that the card was solicited by a fellow employee whose first name was Dennis. Asked what this fellow employee told him before he signed the card, Carney testified that the solicitor stated the card was " . . . to get enough votes in or get enough signatures so we could get a vote at the plant." However, Carney prefaced this testimony with a declaration "I think it was, I'm not positive." Accordingly, Carney testified he read the card before he signed it.

On the basis of the totality of the record before me, I cannot conclude that Carney signed because he was given assurance that his card was to be used only for an election. Under these circumstances, I will count his card as a valid designation in my computation regarding the issue of majority.

Frederick Schmidt: Schmidt testified that he received the card from fellow employee Sam Bellavia who told Schmidt that the card was for ". . . seeing about getting representation or a vote from the UAW."

I find nothing in this statement which suggests that Schmidt was told that the card was only for an

election. Accordingly, I accept Schmidt's card as a valid designation.

Sebastian Ciacek: Ciacek received his card from employee Pates who told Ciacek, "sign the card . . . and bring the Union in . . ." Upon cross-examination and upon a leading question put to him by counsel for the Respondent to the effect that Pates told Ciacek about a vote, Ciacek answered "he said something about bringing the Union in for having a vote."

Upon consideration of all Ciacek's testimony, I cannot conclude that Ciacek was assured that the card was only for an election. Accordingly, I shall count his card as a valid union designation.

Terrence Crook: Crook testified that he received his card at a meeting at the union hall and that he was told that the cards were, "so they could come in and take a vote." Crook further testified that he did not read the card but only filled in his name and

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address because, "He [referring to the solicitor] said it was just for an election and I wasn't against no election." Crook then identified the card solicitor as William Smigelski, International representative of the Union.

However, Smigelski testified that at the meeting he explained the procedures in obtaining recognition and he also explained that it is normal for a company to send a letter of doubt once the union sent a letter requesting recognition. He said in that in-

stance the union would then proceed to the Board and file a petition. Smigelski specifically denied that during his talk he spoke to employees in mentioning the cards that the cards were only for an election.

Upon my observation of both Crook and Smigelski, I find and conclude that Smigelski's testimony was the more reliable of the two. This conclusion is bolstered by the fact that Smigelski further testified that union representatives were instructed by union counsel to stay away from talking about an election as far as the cards were concerned. I finally conclude that what was told the employees at the meeting that Smigelski presided over was that the Union would seek, through the cards, to gain recognition from the employer voluntarily and that if this was not accomplished then a petition for an election would be filed.

Accordingly, I find and conclude that Crook's card may be counted as one in support of the Union's majority claim.

Ronald Guest: Guest received two cards, one from Douglas Gravelle, who merely handed a card to Guest without saying anything, and another from a union man outside the plant who gave Guest a card and a leaflet explaining the Union's claimed benefits. Guest testified that he did hear talk around the plant to the effect that there would be an election. However, Guest did not testify that he was told by anyone representing the Union that the cards were only for an election.

Accordingly, I shall count Guest's card as a valid designation in computing majority.

Donald Bellanca: Bellanca received his card at the union meeting presided over by Smigelski who, according to Bellanca told the employees that the card would be sent ". . . to the Company and the Company will turn around and it will come to the N.L.R.B. and it will come up for a vote and whichever way the vote went is the way it would be."

I do not find this testimony to be inconsistent with Smigelski's testimony to the effect that he told the assembled employees that the cards be used to support a demand for recognition and, failing recognition, they would be used to obtain an election. Under all circumstances, I find and conclude that Bellanca was not told, in effect, that the cards were only to obtain an election, I shall, therefore, consider Bellanca's card as one in support of the Union's claimed majority.

Harold E. Ivon: Ivon testified that it was his understanding at the time he signed his card that the card was for "getting up enough cards signed to get an election." He did not testify that anyone made this representation to him.

(p. 36)

The Board and the courts have long held that an employee's purely subjective reaction as to the meaning of a card, or as to his motivation in signing it, does not negate the overt effect of his designation."[67]

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[67] Joy Silk Mills v. N.L.R.B., 185 F.2d 732, 743 (C.A.D.C.), cert. denied 341 U.S. 914; Gorbea, et al., 300 F.2d 886 (C.A. 1); Winn-Dixie Stores, Inc., 341 F.2d 750 (C.A. 6); Gary Steel Products Corp., 144 NLRB 1160; Economy Food Center, 142 NLRB 901, fn. 2; Aero Corp., 149 NLRB 1283, 1291.

In the instant case, Ivon's card is an unambiguous designation of the Union as bargaining representative.

Accordingly, I find and conclude that Ivon's card is a valid designation.

Samuel C. Bellavia: Bellavia's card, dated September 20, 1966, is postmarked October 15, 1966. Therefore, I can only conclude that the Union did not receive the card until some time after the later date. Although the Union's request for recognition was made on October 7, about a week before the Union could have received Bellavia's card, I find that the Union's demand was a continuous one as evidenced by the Union's participation in the representation case heretofore mentioned. Accordingly, even though Bellavia's card was not received by the Union until after October 15, it may be counted as a card upon which the Union's majority may be based."

Delbert Max Hinderliter: Hinderliter received a card from a union representative outside the plant. This was accompanied by a leaflet explaining the claimed advantages of unionization. Hinderliter signed this card and returned it. He received a second card at a union meeting and signed and returned the latter card also. However, Hinderliter testified that he was asked to sign the second card to verify his attendance at the meeting.

Respondent contends that this testimony renders

"Ed's Foodland of Springfield, Inc., 159 NLRB 1256, 1261.

the designation invalid and that Hinderliter did not request the Union to represent him. I find no merit in this contention. Assuming, arguendo, that the representation was made to Hinderliter before he signed the second card as he testified, and assuming that this invalidated the second card, nevertheless, Hinderliter's other card still remains an unsullied designation. Accordingly, I find that Hinderliter did designate the Union as his representative and I shall count his card as one in support of the Union's majority claim.

Joseph Matteucci: Matteucci testified that he received his card at a union meeting where he was told to sign the card by Smigelski "so we could find out who worked there and how many employees showed up for the meeting and the names and addresses."

However, Matteucci further testified that Smigelski also talked about getting the Union in and "stuff like that." The meeting lasted about an hour. Matteucci filled out all the blank spaces in the card himself and signed it. But, employee James Smith testified that at the union meeting the employees were told that the purpose of the card was to find out how many people wanted the Union.

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I do not find that Matteucci's testimony is completely in conflict with the testimony of Smigelski or Smith heretofore related. Smigelski testified that he told the Respondent's employees about union designation as the primary purpose of the cards and that if the Respondent refused recognition on the basis of the cards, the cards would be used to sup-

port a petition for an election. Certainly, in the hour-long talk, as related by Matteucci, the subject matter could not have been confined to merely asking those assembled to sign for the purpose of taking attendance.

Accordingly, on the basis of the totality of the record, I find and conclude that Matteucci was not induced to sign his card on the representation that it was solely for atttendance purposes. Therefore, I shall rely on this card as valid for the purposes of the disposition of the majority issue.

Donald Cooper and Larry Rollins: The cards of these individuals were identified by a handwriting expert, Joel S. Lisker, a special agent of the Federal Bureau of Investigation, who testified that the handwriting and signatures on the cards and the handwriting and signatures on these individuals' withholding exemption certificates and payroll deduction authorizations were made by the individuals named. I find and conclude that the cards were sufficiently identified and are genuine.

However, Respondent contends that cards should not be counted as designations because the signers were not present at the hearing to identify the respective cards. Therefore, the Respondent was not given the opportunity to examine the individuals on the representations made to them to induce them to sign.

I find no merit in the foregoing contention. The General Counsel made out a **prima facie** case of execution and regularity when he had sufficiently iden-

tified the cards, since there is a presumption that the card was voluntarily signed and that the signatories were aware of what the import of the cards was. In the absence of evidence elsewhere in the record that there was fraud or coercion in the inducement of the signers to sign the cards, I find and conclude the cards are authentic and that they designate the Union as the bargaining representative of the signers, Cooper and Rollins.[69]

Richard Schultz: Schultz testified that he signed his card because other employees were bothering him, especially fellow employee Dick Bishop who told Schultz to sign because the latter would have a guaranteed job if the Union were to get in. Schultz replied that he would be fired if he signed a card. Thereafter, Bishop went to Schultz' brother-in-law's house and persuaded Schultz' sister-in-law to call Schultz' wife about signing. Then Bishop himself called Schultz' wife several times. It became so bad Schultz asked Herman Zimmel to transfer Schultz to the night shift so he could be home days. Schultz was shifted but the calls continued and finally Schultz capitulated and signed.

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[69]I have considered the obvious erasures in the date of the card of Larry Rollins and find that the writing over the erasure is in the handwriting appearing on the rest of the card. I, therefore, find no evidence that the card was not meant by the signer to bear any date other than that appearing on the card. Accordingly, I do not find the erasure to constitute a defect warranting the rejection of the card.

Although the Board has held valid an unambiguous card signed by an employee in order to get his fellow employees "off his back," when the employee had been subject to numerous requests to sign by fellow employees,"[70] I do not find such a situation presented here. The calls by Bishop to Schultz' wife which continued until Schultz, to protect his wife from the pressure, was forced to ask for a shift change, did not constitute mere requests. These calls were, rather, a form of direct and harrowing coercion. Additionally, the calls did not cease when Schultz did change shifts and he ultimately was forced to capitulate to put a stop to the calls.

This becomes a matter of degree. When the calls were extended to Schultz' wife, the degree of pressure changed from that which can ordinarily be expected in organizational drive and industrial life, to unbearable coercive pressure, relief from which could only be obtained by signing a card. Such a signing cannot be deemed voluntary and the card cannot be considered as a valid designation of the Union. I shall, therefore, reject Schultz' card and will not count it toward the Union's alleged majority.

William Reeves: Reeves was told by the person soliciting his signature that signing a card did not mean that it was a vote for the Union. A union designation card of the type involved here is not a vote for the Union. Accordingly, the representation was truthful. I shall, therefore, count Reeves' card in determining whether the Union enjoys majority status.

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[70]See **Triangle Plastics, Inc.**, 166 NLRB No. 86.

James Phillips: Phillips testified that his wife read the card to him and then he signed it. Although Phillips admitted that he cannot read and his testimony as a whole showed Phillips had a poor memory insofar as dates and persons are concerned, nevertheless, I find his card to be a valid designation. There is nothing in Phillips' testimony to indicate that Phillips did not clearly intend to designate the Union as his representative.[71]

In addition to all of the foregoing, it is well to note that at the beginning of the Union's organizational campaign, Gerald Snyder distributed a letter to the employees of the Respondent's plant which, among other things, contained an implication that many of the employees had been coerced into signing authorization cards. In answer to this allegation by the Respondent, Smigelski, on October 18, 1966, addressed a letter to all of the employees in the plant. He mentioned in his letter the matter that Snyder had gone into in Snyder's letter. Smigelski, in his letter, stated all of the employees knew that no one had been coerced or threatened into signing a card nor had any union organizer threatened or coerced anyone or encouraged anyone else to get cards signed by threat or coercion. Smigelski further stated that to keep the record straight, if any employee who had signed a card felt that he was threatened or coerced, he could send a letter so indicating to the UAW regional office, attention Mr. Smigelski, and that the card of the individual who so requested would be returned. Pursuant to his letter not a single

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[71]See Lincoln Mfg. Co., 160 NLRB 1866, 1876.

employee among Respondent's employees requested a return of his card.

(p. 39)

In the light of all of the foregoing, with the exception of the card of employee Richard Schultz, I find that each of the cards submitted by the Union evidenced designation by the employees of the Union as their bargaining representative. Each card is a good and valid designation. Accordingly, I find and conclude that the Union had in its possession at all times material herein 80 duly authorized designation cards. Since the Union needed only 76 such cards, the Union had a clear majority at all times material.

Accordingly, I find, that the Union represented a majority of Respondent's employees in the unit hereinabove found to be appropriate at all times on and after the date the Union made its demand upon the Respondent for recognition and bargaining, and that, therefore, the Respondent was such majority representative at all times material to this proceeding.

3. Concluding findings as to the refusal to bargain

The Board has held that an employer violates Section 8(a)(5) of the Act when it insists on a Board election as proof of a claiming union's majority and where such insistence is motivated not by any bona fide doubt as to the union's majority, but rather by a rejection of the collective-bargaining principle or

by a desire to gain time within which to undermine the union. Whether an employer who refuses to recognize the claiming union and insists upon an election is motivated by good-faith doubt as to the union's majority or by an intention to destroy such majority can be determined only in the light of all of the relevant facts of a case including other unlawful conduct of the employer and the sequence of the events."[12]

I find that in the light of all of the foregoing findings in this case that the Respondent's refusal to bargain with the Union and its insistence upon an election was motivated not by good-faith desire to determine the majority status of its employees but rather by a desire to gain time in which to dissipate the Union's majority. In reaching this conclusion, I consider the many acts of interference, coercion, and restraint, heretofore found, which occurred at or about the time that the Union was organizing, at or about the time the Union made its demand for recognition and the refusal of the Respondent to recognize the Union, and the continued threats and coercive acts of the Respondent made during the period between the filing of the petition for recognition and the election. I further note the discharge of Douglas Gravelle, one of the most active union adherents in the plant and the employee who, in fact, brought the Union into the plant. I conclude that this conduct was designed for the purpose of inducing the employees in the unit to repudiate the Union.

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[12] **Joy Silk Mills**, 85 NLRB 1263, enfd. 185 F.2d 732 (C.A.D.C.), cert. denied 341 U.S. 914.

Accordingly, I find that Respondent's refusal to recognize the Union was motivated by a desire to gain time in which to undermine the Union's majority status and constituted a complete rejection of collective-bargaining principles. I further find and conclude that such conduct is violative of Section 8(a)(5) of the Act."[73]

(p. 40)

IV. The Objections to the Election

As heretofore related, on January 24, 1967, objections to the conduct of elections were filed by the Union which is the petitioner in the representation case. The objections were based on the conduct of the employer which I have heretofore found constituted violations of Section 8(a)(1) of the Act and other objectional conduct of the employer which involved a letter or a handbill of the Respondent distributed to the employees on the morning of the election which was held on January 19, 1967.

As I have found heretofore, between the time of the filing of the petition by the Union and the election of January 19, 1967, the Respondent engaged in numerous acts in violation of Section 8(a)(1) of the Act. It would unduly burden this Decision to restate all of those violations at this time. However, it is sufficient to state that the Board has held that such conduct as is heretofore found to be violative of Section 8(a)(1) and (3) is, **a fortiori**, conduct which interferes with the exercise of a free and un-

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[73] Joy Silk Mills, supra.

trammeled choice in an election."[74]. On this basis alone, there is sufficient reason to set aside the results of the election.

However, in addition to the conduct alleged as violative of Section 8(a)(1), the Union filed an objection relating to the letter of January 19, 1967, heretofore referred to, signed by Gerald Snyder, and distributed to the employees in the plant on the morning of the election.

The letter reads in pertinent part:

> We were informed this morning that last night a number of you were visited at your homes by people from the union who told you that if the union didn't win the election you would lose your job.
>
> I said it many times before and I say it again, your job is safe here. **You will not lose your job** if the union loses the election.
>
> If they will try to scare you now — what will they do if they get in here?

As stated, the foregoing was contained in the letter which was distributed on the morning of the election which was held in the afternoon of January 19, 1967. Thus, the letter was distributed at a time when the Union was unable to answer any of the allegations of that letter.

In refutation of the allegations as set forth above which were contained in the Respondent's letter,

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[74]Playschool Manufacturing Company, 140 NLRB 1417, 1419.

William Smigelski, Howard Smith, and Francis X. O'Melia, all International representatives of the Union, testified that no one on the part of the Union had ever made any such statements to any employee to the effect that if he did not vote for the Union he would lose his job. The only visit made by Smigelski to any of the employees were to the in-plant committee, which visits were made in the early part of the Union's organizational drive. However, on the

(p. 41)

night before the election, O'Melia and Smith did visit the home of employee Kerr. During that visit they asked Kerr if he had any questions concerning the election. There was some discussion and O'Melia did ask how Kerr was going to vote in the election. But both O'Melia and Smith stated in their testimony that they never made any statement to Kerr to the effect that he would lose his job if the Union did not win the election. This testimony of Smigelski, O'Melia, and Smith stands unrefuted and I credit it.

Thus, I find, that the statement by the Respondent to the effect that the Union threatened the employees that they would lose their jobs if the Union was not chosen by them as their bargaining representative was a misstatement of material facts. Moreover, I find that the misstatement of material facts was made at a time when the Union could not learn about it in time to answer and to point out the misstatement of facts. The Board has long held that where one of the parties to an election deliberately misstates material facts in circumstances such as recited hereabove, the Board will find that the bounds

of legitimate campaign propaganda have been exceeded and will set the election aside."[75]

Accordingly, I shall recommend that the representation election heretofore held in Case 3 — RC — 4030 be set aside.

V. The Effect of the Unfair Labor Practice Upon Commerce

The activities of the Respondent set forth in section IV, above, occurring in connection with the operation of the Respondent as set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The Remedy

Having found, as set forth above, that Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action, set forth below, designed to effectuate the policies of the Act. One of the more basic rights conferred upon employees by Section 7 of the Act is the right to freely, without coercion or restraint from the employer, express their choice in a Board-conducted election designed to determine the wishes of the employees with respect to collective-bargaining representative. Since it has

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[75]See United States Gypsum Company, 130 NLRB 901, 904.

been found that Respondent interfered with this right, an order commensurate with the violations found and designed to assure Respondent's employees the opportunity to fully express the rights guaranteed them by Section 7 of the Act is appropriate.

It having been found that the Respondent by threats, interrogation, and promises of benefits interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act, I shall recommend that the Respondent cease and desist therefrom.

(p. 42)

It having been found that the Respondent has discriminatorily discharged employee Douglas Gravelle, I shall recommend that Respondent offer Gravelle immediate and full reinstatement to his former or substantially equivalent position, without further prejudice to his seniority or other rights and privileges. Since I have further found that Gravelle's suspension prior to his discharge was also discriminatorily motivated, I shall recommend that backpay be computed from the date of the suspension, December 1, 1966. In addition, I recommend that the Respondent make Gravelle whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he would normally have earned from the date of his suspension, less net earnings during said period. Backpay shall be computed with interest on a quarterly basis in a manner described by the Board in **F. W. Woolworth Company**, 90 NLRB 289, 291—294, and **Isis Plumbing & Heating Co.**, 138 NLRB 716.

In view of the nature of the unfair labor practices herein found, including discrimination, which goes to the very heart of the Act,"[10] there exists the danger of commission by the Respondent of other unfair labor practices proscribed by the Act. Accordingly, I recommend that Respondent be directed to cease and desist from in any other manner infringing upon the rights guaranteed employees in Section 7 of the Act."[11]

Having found that Respondent has unlawfully refused to bargain with the Union in good faith and has thereby violated Section 8(a)(5) of the Act, I shall recommend that the Respondent cease and desist from refusing to so bargain, and shall further recommend that the Respondent bargain, upon request, with the Union and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent, Snyder Tank Corporation, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aer-

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[10] N.L.R.B. v. Entwistle Mfg. Co., 120 F.2d 532, 536 (C.A. 4).

[11] N.L.R.B. v. Express Publishing Company, 312 U.S. 426, 433.

ospace & Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily discharging employee Douglas Gravelle the Respondent has violated Section 8(a)(3) and (1) of the Act.

(p. 43)

5. All production and maintenance employees including warehouse employees employed by the Respondent's Buffalo, New York, plant, excluding all office clerical employees, professional employees, truckdrivers, truck mechanics, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times since October 7, 1966, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, has been the exclusive representative of all the employees in the aforesaid unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment.

7. By refusing in October 12, 1966, and thereafter, to bargain collectively with the aforesaid labor

organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is ordered that Respondent Snyder Tank Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union activities and their attitude toward the Union, threatening employees with reprisals including threats to close the plant if the Union is selected by the employees to become their bargaining representative, promising the employees benefits if they abandon their adherence to the Union, bypassing the Union as bargaining representative of the employees, and assisting and encouraging employees in distributing antiunion petitions.

(b) Discouraging membership in International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, or any other labor organization, by discharging any employee for engaging in protected union or concerted activ-

ity, by discriminating against employees in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to form, join, assist, or be represented by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activity for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any and all such activity.

(p. 44)

(d) Refusing to bargain collectively with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, as the exclusive representative of its employees in the following appropriate unit:

All production and maintenance employees including warehouse employees employed at the Respondent's Buffalo, New York, plant, excluding all office clerical employees, professional employees, truckdrivers, truck mechanics, guards, and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Douglas Gravelle immediate and full reinstatement to his former or substantially equiva-

lent position, without prejudice to his seniority or other rights and privileges enjoyed, and make Douglas Gravelle whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify Douglas Gravelle if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records and reports, and all other reports necessary to analyze the amount of backpay due under this Order.

(d) Upon request, bargain collectively with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, as the exclusive bargaining representative of the Respondent's employees in the unit found appropriate with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Post at its plant in Buffalo, New York, copies of the attached notice marked "Appendix."[78] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material. No other material relative to this matter should be posted during this period.

(p. 45)

(f) Notify the Regional Director for Region 3, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith.[79]

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[78]In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[79]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 3, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

IT IS FURTHER RECOMMENDED that paragraph 6(e) of the complaint in Cases 3—CA—3101—2 and 3—CA—3199 be dismissed and that the entire complaint in Case 3—CA—3431 be dismissed.

IT IS ALSO FURTHER RECOMMENDED that the election of January 19, 1967, be set aside.

Dated at Washington, D. C.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT question any employees about their union activities or their attitude toward the Union.

WE WILL NOT make threats, including threats to close the plant in the event that any union is successful in organizing our employees or wins any election held for the purpose of determining the bargaining representative of our employees.

WE WILL NOT make promises to our employees of better working conditions, wages, and so forth in order to get them to disaffiliate or disassociate themselves from any labor organization.

WE WILL NOT assist and encourage employees who distribute or circulate petitions against the Union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to form, join, or assist or be represented by the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, or engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection or to refrain from any and all such activity.

WE WILL offer to Douglas Gravelle immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make Douglas Gravelle whole for any loss of earnings that he may have suffered as a result of our discrimination against him.

WE WILL, upon request, bargain collectively with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, as the exclusive bargaining representative of Respondent's employees in the unit found appropriate herein with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement:

All production and maintenance employees including warehouse employees employed at our Buffalo, New York, plant, excluding all office clerical employees, professional employees, truckdrivers, truck mechanics, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

WE WILL notify Douglas Gravelle if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

All our employees are free to become or remain, or refrain from becoming or remaining, members of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the amended Act.

SNYDER TANK CORPORATION
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 4th Floor, The 120 Building, 120 Delaware Avenue, Buffalo, New York 14202, Telephone 716—842—3100.

III. DECISION AND ORDER

177 NLRB No. 94

D-3062
Buffalo, N. Y.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

SNYDER TANK CORPORATION	Cases 3-CA-3101-2
and	3-CA-3199
INTERNATIONAL UNION, UNITED	3-CA-3431
AUTOMOBILE, AEROSPACE	3-RC-4030
& AGRICULTURAL IMPLEMENT	
WORKERS OF AMERICA AFL-CIO	

DECISION AND ORDER

On January 23, 1969, Trial Examiner Morton D. Friedman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the

Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.[1] The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings,[2] conclusions,[3] and recommendations of the Trial Examiner as modified herein.

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[1]The Respondent excepts to the Trial Examiner's credibility findings. It is the Board's established policy, however, not to overrule a Trial Examiner's resolutions with respect to credibility unless, as is not the case here, the preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. **Standard Dry Wall Products, Inc.**, 91 NLRB 544, enfd. 188 F.2d 362 (C. A. 3). As for the Respondent's contention of bias and prejudice on the part of the Trial Examiner, we have reviewed the record and find the contention to be without merit.

[2]In essential agreement with the Trial Examiner, we conclude that Respondent violated Section 8(a)(5) of the Act by rejecting the Union's recognition and bargaining demand as the majority representative of its employees in an appropriate unit, and embarking upon a campaign of flagrant unfair labor practices, commencing almost immediately after the organizational drive began and persisting up to and after the election, in its effort to thwart the Union. Those violations which include interrogation of employees concerning their

Union activities, warnings of loss of benefits and more onerous working conditions, withholding wage increases, promises of benefits, threats of discharge and layoff, warnings of plant closure, assisting and encouraging employees in distributing an antiunion petition, and the discharge of a leading union supporter, were clearly designed to and did undermine the Union's support, and destroyed the conditions necessary to the holding of a free election on the Union's petition. We find that such conduct made the holding of a fair election in the future unlikely. For these reasons, we conclude that, in order to protect the statutory rights and interests of employees and to remedy the unfair labor practices committed, it is essential that the Respondent be ordered to recognize and bargain with the Union as the statutory representative of its employees for the purposes of collective bargaining. **N.L.R.B. v. Gissel Packing Company,** U.S. (June 16, 1969).

In setting aside the election, we rely on the numerous unfair labor practices committed by Respondent. Therefore, we deem it unnecessary to rely on the Trial Examiner's further finding that Respondent's letter of January 19, 1967, to its employees, contained "a misstatement of material facts" which exceeded the bounds of legitimate campaign propaganda. Chairman McCulloch and Member Brown affirm the Trial Examiner's finding that Respondent's January 12, 1967, letter to its employees violated Section 8(a)(1) of the Act. See comments of the Supreme Court in **Gissel Packing Company, supra,** in paragraph beginning at page 41 of the slip decision. Member Zagoria would find that said letter does not violate Section 8(a)(1). Chairman McCulloch and Member Zagoria find, contrary to the Trial Examiner, that Respondent's conducting of a poll of its employees and publishing the results thereof together with the memorandum comments thereon did not violate Section 8(a)(1) of the Act. Member Brown would affirm the Trial Examiner on this issue but would ground his finding on interference with employees rights rather, than the "bypassing" rationale used by the Trial Examiner.

[a]In the absence of exceptions, we adopt, **pro forma,** the Trial

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent Snyder Tank Corporation, Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Delete the following language from paragraph 1(a) of the Trial Examiner's Recommended Order:

> . . . bypassing the Union as bargaining representative for the employees. . . .

IT IS FURTHER ORDERED that the petition in Case 3-RC-4030 be, and it hereby is, dismissed, and all proceedings held in connection therewith be, and they hereby are, vacated.

Examiner's dismissal of the allegation concerning President Gerald Snyder's interrogation of employee George Glore. On page 34 of his Decision, the Trial Examiner inadvertently referred to certain testimony as being that of Sebastian Ciacek whereas the record shows that this is the testimony of Anthony Cacic. Similarly, on page 35 of his Decision, the Trial Examiner referred to testimony as being that of Harold E. Ivon whereas the record shows that this is the testimony of Richard Lucas. Also, the Trial Examiner referred to Respondent's President Gerald Snyder's speech of January 18, 1967, as being on the day of the election whereas the record shows that the election was conducted on January 19, 1967.

Dated, Washington, D. C. June 30, 1969

Frank W. McCulloch, Chairman
Gerald A. Brown, Member
Sam Zagoria, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Supreme Court, U.S.
FILED
OCT 22 1970
E. ROBERT SEAVER, CLERK

No. 885

IN THE

Supreme Court of the United States

October Term, 1970

SNYDER TANK CORPORATION,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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WILLIAM K. BENNETT
ROBERT KAPUSTA
LEO P. CARROLL
BENNETT & KAPUSTA
75 Broad Street
Milford, Connecticut

No.

Supreme Court of the United States

October Term, 1970

SNYDER TANK CORPORATION,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

The attorneys for Snyder Tank Corporation petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

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OPINIONS BELOW.

The opinion of the Court of Appeals (App. pp. 1a) are not yet officially reported. The decision and order of the National Labor Relations Board is reported at 177 NLRB 94 (App. pp. 9a)

JURISDICTION.

The judgment of the Court of Appeals was entered on July 27, 1970 (App. pp. 1a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Did the Court of Appeals for the Second Circuit deny due process to the employer by upholding findings without factual support and err in upholding the finding that Douglas Gravelle was discriminately discharged since its decision stating "The company could cite no other instance in which a firing took place for a first offense" — is absolutely contrary to the evidence.

2. Has the Court of Appeals for the Second Circuit erroneously construed Sections 8(a)(1), (3) and (5) of the National Labor Relations Act so as to establish a rigid standard for employers, yet a lenient one for unions, and thus violate the concept of equal protection and due process and discriminate against employers.

3. Has the Court of Appeals for the Second Cir-

cuit misconstrued the holding of this Court in NLRB v. Gissel, 395 U.S. 575 and permitted misuse of authorization cards thus removing the sanctions as to fraud, coercion and misrepresentation established therein from unions, to the detriment and prejudice of employers.

4. Did the Court of Appeals for the Second Circuit err in upholding the finding that the union obtained valid authorization cards from a majority of the employees where evidence of fraud, coercion and misrepresentation, deliberately and clearly calculated to direct the signers to disregard and forget the language on the cards is clearly present in the record.

5. Did the Court of Appeals for the Second Circuit err in upholding the finding the proper remedy for the alleged Sections 8(a)(1) and (3) violations was an order to bargain because the acts complained of were not of sufficient gravity to warrant a bargaining order.

STATUTES INVOKED.

The relevant statutes invoked are the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, et seq) and the United States Constitution, 5th Amendment, set forth in the appendix at page 7a and page 9a, respectively.

THE BOARD'S FINDINGS OF FACT.

In September, 1966, the union, the International

Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, which intervened on the side of NLRB in the Court of Appeals, began an organization drive among petitioner's employees. The main means of attack was securing authorization cards from the employees. The wording on the cards was clear and it designated the union as the employee's representative for purposes of collective bargaining. While circulating the cards, the union held meetings to encourage the employees to sign cards.

On October 7, 1966, the Union wrote to the petitioner demanding recognition claiming it had valid authorization cards from over half the employees. At the same time, the Union filed a representative petition with the Board. The petitioner refused to bargain, stating that it doubted that the Union had been "voluntarily designated by an uncoerced majority." This good faith doubt was never challenged.

In that October and November, representation hearings were held. The Board found that the petitioners continued to express opposition to the Union. Another finding was that one employee, Douglas Gravelle, was discharged for his Union activity.

In January 19, 1967, an election was held. A majority of the employees did not vote for the union. The Union immediately filed unfair labor practice charges.

THE BOARD'S CONCLUSION AND ORDER.

The Board found that the petitioner violated Sections 8(a)(1) (3) and (5) of the National Labor Relations Act. The 8(a)(1) violation was based on the conclusion that the petitioner coerced the employees by interrogating the employees, by threatening to close the plant, by warning of more onerous working conditions, and by providing benefits if the Union were rejected. The Section 8(a)(3) violation was the discharge of Douglas Gravelle. The Section 8(a)(5) violation was refusing to recognize and bargain with the Union.

The Board ordered the petitioner to cease and desist from the unfair practices, to reinstate Gravelle, and to recognize and bargain with the Union.

THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals sustained the Board's finding that the petitioner had engaged in restraint and coercion in violation of Section 8(a)(1) of the Act. The Court further found that the petitioner violated Section 8(a)(3) of the Act by discharging Gravelle. The Board also found a violation of Section 8(a)(5) of the Act.

REASONS FOR GRANTING THE WRIT.

While some of Appellant's claims of error are factual, they cry out for review as being without factual support.

1 The Trial Examiner found Douglas Gravelle had committed the act (throwing blocks into an aisle where other employees were wheeling carts loaded with metal tanks) for which the employer discharged him.[1] He also found it was a dangerous act warranting discipline.[2] He then substituted his mental processes for the actual testimony and found the employer discharged Gravelle for "horseplay".[3] Not even the testimony of Gravelle himself claimed this. His testimony was he accidentally dropped the blocks. The Company claimed he deliberately blocked the aisle. The Examiner on this conflicting evidence found he was committing horseplay.

An employer is entitled to a hearing of and the decision on the charges against him according to the fundamental principles that adhere in due process of law — the decision of the Board shall be governed by and based upon the evidence produced at the hearing.[4] There is no evidence to support a finding of "horseplay". Where an administrative order

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[1] "It may well be argued that the reason for this was that the offenses were minor and that the offense of Gravelle was major in impact." (Decision P. 27)

[2] "It cannot be denied that placing obstructions in the rather narrow aisles of the plant was a dangerous practice." (Decision of Trial Examiner P-27)

[3] "Suddenly for an infraction involving horseplay . . . this employee . . . was discharged without being given an opportunity to explain his action" (Decision P-27)

[4] NLRB v. Prettyman, 117 F. 2d 786, 790

is without factual support, as herein, it is without due process.[1]

When good cause for discharge appears, the burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. Mere existence of union animus is not enough.[2] The evidence fails to disclose facts to support the finding of discriminatory discharge. It is totally lacking in evidence to support the finding of horseplay. Such a finding is arbitrary and capricious and should be subject to review in depth.

In its decision on appeal, The Second Circuit stated "Similarly, substantial evidence supports the Board's conclusion that Gravelle was discharged, not for violation of work rules (since the company could cite no other instance in which a firing took place for a first offense) but because . . ." Considerable controversy developed at trial over the production of the company records as to firings as a result of a subpoena served during the trial. It was finally stated upon the record that in 1966, nine (9)

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[1]Garvey v. Freeman, 397 F. 2d 600, 610
[2]NLRB v. Butler Shoe Co., 68 LRRM 2699
NLRB v. United Parcel Service Inc., 317 F. 2d 912
Raytheon Co. v. NLRB, 362 F. 2d 471 and Sec. 10 (C) of the amended Act.

employees were discharged. Three (3) of them, including Gravelle, for a first offense.'

The decision upholding the discharge of Gravelle predicated as it is on the erroneous statement the company could cite no other instance of a firing for a first offense,' is a positive denial of due process to the employer.

2 A comparison of the standards applied in the instant case reveals a rigid standard was established for the employer in adjudging pre-election and organization drive statements while a carte blanche standard was applied to union solicitation statements which ignored the sanctions of fraud, coercion and misrepresentation.

The utterances of either side in an election campaign ought not to receive a narrow or strained construction.' Yet such a construction was applied to the

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'Testimony of Gerald Snyder

Q. And then you remember in that statement saying, "In each and every case, except that of Richter, Monk and Gravelle, these employees had been talked to innumerable times, had been warned innumerable times and every effort had been made to try to get them to straighten out."

A. If it's in a letter and I said it, that's the fact.

Q. Is it or is it not a fact? You say, "If it's in a letter."

A. It certainly is a fact.

Q. So except to Gravelle and two other people, you were lenient, speaking to them on numerous occasions trying to straighten them out; is that right?

'See Appendix for Court of Appeals Decision.

'Union Carbide Corp. v. NLRB, 310 F. 2d 849

employer even though no employee was restricted by the company from participating in the representation election." [The Examiner found the speech of the Company President on the day before the election" informed the employees the yearly wage increase would be held up. The Court of Appeals upheld this finding in reaching its decision". Yet the speech was in evidence as an exhibit and doesn't support the finding.]

By applying a different standard for the employer, it has been adjudged the company violated Section 8(a)(1) by coercive interrogation, promise of benefits, suspension of automatic benefits threats of plant closure, etc.

By construing the acts and statements of the union against a different standard, its acts and statements in procuring union authorization cards were allowed without regard to fraud, misrepresentation and coercion."

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[10]NLRB v. Arkansas Grain Corp., 67 LRRM 2908.

[11]Appendix — Respondents Exhibit 14.

[12]See Court of Appeals Decision in Appendix.

[13]a) The testimony of Matteucci:

Q. (By Trial Examiner) In other words, you are telling us that they told you that was for the purposes of attendance, is that correct, this card?

A. Yes, sir, that was the —

Q. To show you were there. A. Yes, Sir.

b) Testimony of D. Hinderliter:

Q. When was that? A. At one of the meetings. I signed — they told me it was just to verify that we was there.

(footnote continued on bottom of p. 9)

An employer does not violate Section 8(a)(1) by interrogating employees about union representation," by stating the employees best interests lay in the union's defeat, by stating employees would not be able to discuss gripes directly with management if a union came in." None of the Employer's statements or those of the working foremen were mis-

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c)The testimony of Donald Bellanca:
A. Well, he said you sign the card and it goes — well, they send them to the Company and the Company will turn around and it will come up to the NLRB. And it will come up for a vote, and whichever way the vote went is the way it would be.

d)The testimony of Terrance Crook:
Q. Did they say what the reason for the cards were. A. So that they could come in and take a vote.

e)The testimony of Frederick Schmidt:
Q. What did he tell you the card was for. A. He told us the card was about seeing about getting representation or vote from the U.A.W.

f)The testimony of Bernard Carney:
I think he said to get a vote to get enough votes in or get enough signatures so we could get a vote at the plant.

g)The testimony of Chad Troup:
To fill this card out was for getting a vote, so you could vote for the Union to come in.
Q. It was getting an election? A. For getting an election.

h)The testimony of Charles Hartman:
Q. Was anything said to you when you received the card? A. Well, they were talking about getting an election for that it was, the card was for, to get an election to try to get a Union down there.

"NLRB v. Howard Quarries Inc., 62 LRRM 2512

"Wornall v. Pub. Co., 171 NLRB 34

leading or inaccurate and neither implied nor expressed threats of reprisal or promise of benefit."

The Board in United States Gypsum Company[9] clearly stated "exaggerations, inaccuracies, partial truths, name calling and falsehoods, while not condoned, may be excused as legitimate campaign propaganda provided they are not so misleading as to prevent the exercise of a free choice by employees. No employee testified he was restricted in his right of self-organization."

Why should the Court of Appeals for the Second Circuit assist a union to deceive and dupe employees into signing authorization cards and deny to employers the right of legitimate statements accorded them by the Act."

This application of a double standard violates the employers right to equal protection of the law and denies them due process.

3 Card authorization cases have run the gamut through all the Circuits and in Gissel[10] this Court resolved the conflict among the circuits. However, it did establish guide lines for the application of

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[9]Section 8 (c) L.R.M.A.

[10]130 NLRB 901, 904

[11]NLRB v. Penner Inc., 432 F. 2d 826

[12]120 NLRB 901, 904

[13]395 U. S. 575

Gissel which the Second Circuit misapplied in the instant case. They are:

"— employers should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature".

"We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else."

There is no dispute herein that union adherents made representations in soliciting authorization cards. The query is did they violate the sanctions established by Gissel.

The Court of Appeals held the cards were clear on their face" and petitioner agrees. It decided the trial examiner and the Board resolved what conflicting testimony there was against the company but did not review it. Thus, we have the "too mechanical adoption of the Cumberland rule." The union adherents admittedly solicited cards on the representation they sought an election." In the Board's own words "a different situation is presented, of course, where union organizers solicit cards on the explicit or indirectly expressed representation they

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[8] See appendix for Court of Appeals Decision

[9] 144 NLRB 1268

[10] See footnote #13

will use such cards only for an election and subsequently use them for a different purpose." The testimony set forth in footnote 13 strengthens our contention. The employee Matteucci signed a card solicited in violation of the Gissel rulings[34] so did the employee, D. Hinderliter.[35] This is the type of fraud and misrepresentation rejected by Nichols[36] and disapproved by Gissel, " - - - unless expressly told their act of signing represents something else."

The representations to others [37] also violates the Gissel holding — "unless the language is deliberately and clearly calculated to direct the signer to disregard and forget the language above his signature."

4 In the instant case the Union claimed to represent a majority of the employees of Snyder Tank Corporation and submitted 81 authorization cards in support of its claim. Seventy-seven cards represented a majority. On trial one card was rejected for coercion. The Trial Examiner found the Union represented a Majority which was dissipated by acts of Respondent constituting Section 8(a)(1) and Section 8(a)(3) violations and ordered Respondent to

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[34]Q. (By Trial Examiner) In other words, you are telling us that they told you that was for the purposes of attendance, is that correct, this card?
A. Yes, sir, that was the —.
Q. To show you were there. A. Yes, Sir.

[35]Q. When was that? A. At one of the meetings. I signed — they told me it was just to verify that we was there.

[36]380 F 2d 428

[37]See footnote #13

bargain with the Union. On appeal to the Second Circuit Court of Appeals such finding was upheld. The appellate Court citing the recent decision by the Supreme Court in Gissel.

Snyder seeks further appeal and alleges a misapplication of the Gissel doctrine and other errors set forth hereafter.

A rejection of four (4) cards would defeat the alleged Union majority.

The following four (4) cards should have been rejected for the following reasons:

1. General Counsel's Exhibit 5g, the card of Samuel C. Bellavia, should be rejected because the card was not in the Union's possession when it claimed a majority on Oct. 7, 1966, and was not actually mailed until Oct. 15, 1966. Therefore it cannot be counted."[20]

2. General Counsel's Exhibit 5-bbbb, the card of one Larry Rollins, who was not produced as a witness, was admitted into evidence with an admitted alteration on the face of the card on the date. In the absence of explanation this card cannot be admitted into evidence under any rule of evidence known.

3. General Counsel's Exhibit 5 hh, the card of Delbert Max Hinderliter, who testified that he signed the card because he was told it was to show attend-

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[20]Schwarzenback-Huber v. NLRB, 488 F. 2d 236 (1969), cert. den. 396 U. S. 960

ance at a Union organization meeting should not be counted because it violates the proscription of Gissel ". . . unless expressly told his act of signing represents something else."

4. General Counsel's Exhibit 5 ss, the card of Joseph Matteucci, who testified that he signed the card because he was told it was to show attendance at a union organization meeting should not be counted because it too was obtained on the express representation that his act of signing represented something else.

The acceptance of the Matteucci and Hinderliter cards by the Trial Examiner and the refusal of the Second Circuit Court of Appeals to set them aside violates the Gissel decision; the acceptance of the cards of Bellavia and Rollins and the refusal of the Second Circuit Court of Appeals to void them violates the rules of evidence and denies the Company due process.

It is conceded the printed language of the card is clear and unambiguous. Respondent claims the actual testimony of the signers, Matteucci and Hinderliter, just as clear and unambiguously shows they were induced to sign the cards by fraud and misrepresentation and to ignore the printed language on the cards themselves thus bringing these two cards within the clear and unambiguous language of this court in Gissel. " . . . they were told their act of signing represented something else." They should have been rejected.

Gissel surely was not intended to give union sol-

icitors an open sesame to all sorts of fraud and misrepresentation but indeed was promulgated to prevent such fraud and misrepresentations in procuring authorization cards. A rose is a rose is a rose! A misrepresentation (calculated to have the signer ignore the printed language of the cards) is a misrepresentation is a misrepresentation. The Supreme Court in Gissel warned with the wisdom of its experience to examine the totality of the circumstances in these authorization card cases. The Trial Examiner and the appellate Court failed to heed this warning. The record is replete with the very fraud, coercion and misrepresentation that Gissel proscribes. Other cards were obtained in similar fashion. Even the Trial Examiner rejected one for coercion. Other cards which in the totality of the circumstances should have been rejected are:

General Counsel's Exhibits: a) 5s — Terrance Crook; b) 5cc — Ronald Guest; c) 5j — Donald Bellama; d) 5kkk — Frederick Schmidt; e) 5v — Bernard Carney; f) 5u — Sebastian Ciaceb; g) 5qq — John Szmalec; h) 5w — Chad Troup; i) 5 qqq — James Stuhr; j) 5kk — Charles Harman. Each of these cards was solicited, as the evidence clearly shows, with an understanding or representation deliberately induced by the Union, that there would be an election and to disregard and forget the language on the card. These along with the four cards previously described should be rejected. The union then would not have had a majority and the order to bargain should be set aside.

5. We question the propriety of a bargaining order for an alleged Section 8(e)(5) violation in the instant case for the following reasons:

a) the alleged Sections 8(a)(1) and 8(a)(3) violations are questionable, and at best, not serious enough to call for a bargaining order.[30]. b) the issue as to the validity of the union majority is under challenge.

The polling complained of herein was reasonable.[31]

There was no coercive interrogation, restraint or coercion of employees in their right of self-organization or voting.[31]

An employer is free to communicate to his employee any of his general or specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or proviso of benefit.[32]

All of the Company's letters and speeches are in possession of the Board, are part of the record and reveal nothing serious enough to warrant an order to bargain.

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[30]Aaron Brothers 158 NLRB 1077, Hammon D & Irving Inc. 154 NLRB 84

[30]Strucksnes Construction Co. 165 NLRB 102

[31]The trial transcript contains no evidence of coercive interrogations, surveillance or restraint.

[32]Textile Workers v. Darlington Mfg. Co., 380 U. S. 269

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 885

SNYDER TANK CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–7a) is reported at 428 F. 2d 1348. The decision and order of the National Labor Relations Board (Pet. App. 9a–98a) are reported at 177 NLRB No. 94.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1970 (Pet. 1). The petition for a writ of certiorari was filed on October 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that the employer violated the National Labor Relations Act by discharging an employee because of his union activities; by engaging in other conduct which restrained and coerced employees in the exercise of their right to self-organization; and by refusing to recognize and bargain with the union notwithstanding that it had valid cards from a majority of the employees authorizing it to act as the bargaining representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition (Pet. App. 7a–9a).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. During September 1966, the United Auto Workers began an organizational campaign among the Company's production and maintenance employees (Pet. App. 13a). Union authorization cards[1] were solicited from the employees at the plant and at meet-

[1] The cards, which were headed "Authorization Card" followed by the Union's name, read as follows (Pet. App. 3a, n. 1):

> I, the undersigned, hereby designate, select and empower the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW, AFL–CIO) as my representative for the purpose of collective bargaining in respect to rate of pay, wages, hours of employment and other conditions of employment.

ings at the Union hall (Pet. App. 13a, 65a–78a). The Company resisted the Union's organizational efforts.

Company supervisors began to interrogate employees about the Union and warn them of adverse effects of unionization.[2] After the first union meeting, for example, Night Foreman Pajak asked employee Dennis Gravelle what had occurred at the meeting and warned that, if the Union got in, the employees would have to stay at their machines the full ten hours of the work day with "no walking around or nothing" (Pet. App. 27a; R. 145a–146a).[3] Foreman Maue told various employees that unionization might result in less work available with concomitant layoffs(Pet. App. 22a; R. 131a–132a); that, with the Union, there would be fewer coffee breaks and a less lenient policy toward absences (Pet. App. 22a–23a; R. 197a–198a); that men with little seniority and physicial disabilities would lose job security (Pet. App. 32a; R. 207a–208a); and that things would generally be "worse" if the Union succeeded (Pet. App. 26a; R. 271a). Supervisors Smith and Salsbury made similar warnings to employees (Pet. App. 29a–30a; R. 275a, 141a–142a).

On October 7, 1966, after securing authorization cards from a majority of the employees (see p. 9, n. 6, *infra*), the Union sent a letter to the Company requesting recognition and bargaining. Shortly thereafter, it filed

[2] One employee, Phillips, was interrogated by four different supervisors concerning his union sympathies (Pet. App. 16a–17a, 30a, 32a; R. 183a, 196a).

[3] "R." references are to the appendix to the briefs in the court below.

a representation petition with the Board (Pet. App. 13a). On October 12, 1966, the Company, by letter, rejected the Union's request for recognition, stating that it did not believe the Union had been voluntarily selected by a majority of the employees (*ibid.*).

A hearing on the Union's representation petition was held on October 27 and 28, and November 14, 1966. During this period Company supervisors continued to interrogate employees. Foreman Maue asked employee Ronald Guest whether he planned to vote for the Union. Guest answered that he did not know but it was none of Maue's affair. (Pet. App. 18a; R. 259a.) Maue then told Guest that, if the Union succeeded, there would be strikes, layoffs, and similar actions that could affect Guest's family (Pet. App. 32a; R. 259a). Maue told employee John Pates that "Snyder would close the doors like they did in Alabama if the Union got in" (Pet. App. 43a; R. 309a–310a), and warned other employees that working conditions would become "stricter" (Pet. App. 23a, 24a–26a; R. 217a–218a, 227a–228a). Foreman Pajak suggested to employee Scherff that his chances of promotion would be improved if the Union lost (Pet. App. 34a–35a). Foreman Salsbury (Pet. App. 33a; R. 275a), Vice-President Snyder (Pet. App. 33a–34a; R. 274a); Plant Superintendent Zimmer (Pet. App. 33a; R. 274a), and Foreman Stark (Pet. App. 26a; R. 256a–257a) engaged in similar conduct.

2. On December 5, 1966, the Company discharged Douglass Gravelle, who had initiated the Union cam-

paign, solicited authorization cards, and testified on behalf of the Union at the Board representation hearing (Pet. App. 54a–55a; R. 170a–172a). Gravelle had never been reprimanded for his work prior to his discharge; in fact, he had received two raises and had been complimented on his performance (Pet. App. 54a; R. 169a). During the Union campaign, Company President Gerald Snyder, basically on the complaint of employee George Glore, accused Gravelle of threatening plant personnel. Glore also told Snyder that he thought the Union had planted Gravelle in the factory (Pet. App. 55a; R. 115a–116a, 181a). Also during this period, Foreman Pajak remarked to employee Waz that Gravelle was getting "too big for his britches" in trying to get the Union into the plant, and that Gravelle was going to try to tell everyone how to run the plant (Pet. App. 55a–56a; R. 273a).

On the night of November 30, 1966, Gravelle put some wooden blocks[4] in the aisle adjacent to his work station, intending later to remove them from the plant by means of an overhead crane. As he was about to get the crane, Foreman Pajak came and asked: "What did you throw the blocks in the aisle for?" Gravelle answered that he had not thrown them. The next day, Gravelle was suspended pending investigation of the incident. (Pet. App. 56a–58a; R. 173a–177a.) On the morning of December 5, Gravelle telephoned Superintendent Zimmel and asked when he could return to

[4] The blocks were approximately 2 to 3 feet long and made from 2 by 4 or 3 by 3 lumber (Pet. App. 56a).

work. Zimmel answered that the investigation had not yet been completed but that the Company would let him know. The next morning, Gravelle received a letter stating that he was terminated. (Pet. App. 59a; R. 179a.)

3. In the period immediately preceding the Board representation election on January 19, 1967 (Pet. App. 13a), Foreman Maue continued to interrogate employees about their union sympathies and to predict that a worsening of work conditions would accompany union success (Pet. App. 25a–26a; R. 337a–338a). Foremen Taylor and Stark engaged in similar conduct (Pet. App. 26a–27a; 30a–31a; R. 236a, 239a–240a, 287a–288a, 339a, 934a–935a, 713a–714a).

On January 12, 1967, Company President Snyder sent a letter to the employees asserting that the Union's campaign promise of job security was a "cruel hoax" (Pet. App. 38a). The letter set forth the names of 11 unionized plants which had allegedly shut down—four of them in the area where the Company's plant was located. According to the letter, two plants closed because they could not continue to operate under the union contract, two because of strikes, and another because of unreasonable union demands. One plant, the letter added, had shut down three months after the union had won an election on the basis of a "job security" campaign. The letter concluded (Pet. App. 41a):

> WHAT HAPPENED TO THE JOB SECURITY OF ALL THESE PEOPLE? In-

> stead of protecting them the unions were instrumental in their being out of work—with no jobs to go back to. We are not saying we will go out of business. We won't so long as we can make a reasonable profit. What we are saying is that much bigger companies than we have been forced out of business through excessive union demands. When they did the employees lost their jobs. You judge from this just how the unions can guarantee you job security.

In a speech on January 18, 1967, the day before the election, President Snyder told the employees that their future could be determined by how they voted the next day. He promised them two additional paid holidays and a 15-cent an hour raise, and that he would investigate forming a grievance committee or procedure. Snyder stated that the Company usually gave raises as a result of an annual review of wages and that its review had revealed that many employees were entitled to increases. He added, however, that the Company was afraid to grant the increases because the Union might file unfair labor practice charges. (Pet. App. 36a; R. 247a, 297a, 299a, 302a–303a.)

The Union lost the representation election and filed objections based on the Company's conduct during the preceding months.[5] The Union also filed unfair labor

[5] After the Union filed objections to the election, employee James Lewis, with Vice-President James Snyder's consent and advice, drafted and circulated a petition among the employees disavowing union support. As Lewis circulated the petition for signatures, Superintendent Zimmel followed him up the aisles, remaining 25–30 feet behind. (Pet. App. 49a–53a; R. 150a, 160a–164a, 304a–308a, 154a, 120a–122a.)

practice charges against the Company. The two matters were consolidated for hearing. (Pet. App. 10a–11a.)

B. THE DECISIONS BELOW

The Board held that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union activities and sympathies; threatening them with economic reprisals, including closing the plant, if they selected the Union as their bargaining representative; promising them benefits if they abandoned the Union; announcing that wage increases were being withheld solely because of the Union; and assisting and encouraging employees in the preparation and distribution of an antiunion petition. (Pet. App. 21a, 31a, 34a, 37a, 41a–43a, 48a–49a, 53a.) The Board further held that employee Gravelle was discharged because of his union activities, in violation of Section 8(a)(3) and (1) of the Act (Pet. App. 63a). The Board rejected the Company's contention that Gravelle was discharged because he threw blocks in the aisle, noting that, although at least four other incidents involving blocking the aisles had occurred, no disciplinary action had been taken against the employees involved (Pet. App. 59a–61a). The Board also found that there were only two other instances of disciplinary discharge without prior warning and that they involved serious offenses such as defying authority and punching an absent employee's timecard (Pet. App. 61a).

Finally, the Board held that the Company violated Section 8(a)(5) by refusing to recognize the Union and bargain with it.[6] It found that the Company's unfair labor practices during the organization campaign so undermined Union support as to make a fair election in the future impossible. The Board therefore set aside the election and ordered the Company to bargain with the Union upon request (Pet. App. 89a, 95a–97a). It also ordered the Company to cease and desist from the unfair labor practices and to reinstate Gravelle with back pay (Pet. App. 87a–89a, 97a). The court of appeals, *per curiam*, sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a–7a).

ARGUMENT

Petitioner's challenges to the Board's unfair labor practice findings and its bargaining order, which were sustained by the court of appeals, present only evidentiary issues which do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Re-*

[6] The Union obtained 81 cards from among 151 employees (Pet. App. 65a). One card was rejected by the Examiner (Pet. App. 75a–76a). The Company challenged the cards of 17 other employees—12 on the ground that they were obtained on the basis of misrepresentations, two on the ground that they were insufficiently authenticated, one on the ground that it was obtained by coercion, one on the ground that the signer could not read and had a poor memory, and one on the ground that it was not received by the Union until after its October 7, 1966 letter demanding recognition. The Examiner rejected these challenges (Pet. App. 65a–78a).

lations Board, 340 U.S. 474, 491. In any event, the facts amply support the Board's findings.[7]

The court of appeals, correctly applied the standard articulated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 606 in rejecting petitioner's objections to certain authorization cards. It found that "[T]he cards were clear on their face; and the trial examiner resolved what conflicting testimony there was against the company" (Pet. App. 7a).[8] Peti-

[7] There is no substance to petitioner's contention (Pet. 1, 5–6) that the court below sustained the Board's finding concerning Gravelle because of an erroneous view that no other employee had been discharged without warning. The court stated (Pet. App. 4a): "Douglas Gravelle * * * was discharged for a minor violation of company work rules, despite an absence of any indication that other employees had been released for *similar first* infractions" (emphasis added). Its later reference (Pet. App. 6a) to "no other instance" must be read in light of the earlier language. Moreover, contrary to petitioner (Pet. 5–6), the Examiner credited Gravelle's testimony that he merely kicked the blocks into the aisle to get them out of the way temporarily, and that he was planning to get the crane to pick them up (Pet. App. 56a–57a, n. 56).

[8] Petitioner objects to the validation of the cards of employees Bellavia, Rollins, Hinderliter, and Matteucci (Pet. 13–14). As to the card of Bellavia, petitioner ignores the fact that the Examiner found that the Union's demand for recognition was a continuous one which extended beyond the date Bellavia's card was received (Pet. App. 72a); in any event, the Union had a majority on October 7, 1966, without his card (p. 9, n. 6, *supra*). As to that of Rollins, petitioner ignores the Examiner's finding (Pet. App. 75a, n. 69) that the erasure and writing over were in the same hand as the writing on the rest of the card. As to the card of Hinderliter, petitioner ignores the Examiner's finding that Hinderliter signed two cards, one of which was unquestionably valid (Pet. App. 72a–73a). And, as to the card of Matteucci, petitioner ignores the fact that the Examiner did not credit Matteucci's version of what representations were made at the meeting where he signed the card (Pet. App. 73a).

tioner's contention (Pet. 16) that a bargaining order is not appropriate because "[t]here was no coercive interrogation, restraint or coercion of employees in their right of self-organization or voting" ignores the Board's finding, sustained by the court of appeals, that throughout the organizing campaign and thereafter the Company engaged in "a campaign of flagrant unfair labor practices" (Pet. App. 95a, n. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1970

No. 885

SNYDER TANK CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Respondents.

MEMORANDUM OF INTERVENOR IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MEMORANDUM OF INTERVENOR IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Facts and Background

Four years and two months ago (October 7, 1966), the union herein, notified the Petitioner, that it represents a majority of its employees and demanded recognition as collective bargaining agent. The letter further stated:

> "We stand ready to prove our majority status by submitting our signed cards to any impartial government agency or an impartial third party" (Gen. Counsel Ex. 3).

The Petitioner refused to recognize the union on the ground that it "doubted that the union had been voluntarily designated by an uncoerced majority" (Gen. Counsel Ex. 4).

The facts and issues have been tried before a Trial Examiner of the National Labor Relations Board. They were reviewed by the Board (177 N.L.R.B. No. 94) and by the Court of Appeals of the Second Circuit (July 1, 1970, Docket Nos. 33943, 34094). Petitioner now seeks a new review by this Court.

The facts and background are:

Sometime in the middle of September 1966, the Intervenor [1] received a telephone call from Mr. Gravelle, an employee of respondent-appellant, asking the union to organize the employees of the employer [2] (Tr. p. 19, l. 1; p. 20, l. 6; TXD, p. 24, l. 8).

Thereafter, a union representative met with Mr. Gravelle at the latter's home and left with him union authorization cards for membership solicitation among the employees (Tr. p. 20).

Between September 18, or 19 of 1966, and October 7, an intensive campaign was carried on by the union for solicitation of union authorization cards (Tr. p. 21; TXD, p. 2, ll. 1-5), and on October 7, 1966, the union sent a letter to the employer advising that it has a majority of the employees in the barganing unit and demanding recognition and negotiation of a contract (Gen. Counsel Ex. 3).

Not having received a reply, the union filed a petition for certification on October 11, 1966 (Gen. Counsel Ex. 1). On October 12, 1966, the employer answered the letter of October 7, refusing the demand of the union for recognition and to bargain collectively (Gen. Counsel Ex. 4).

A hearing was thereupon ordered by the National Labor Relations Board under the provisions of Section 9(c) of

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[1] The Intervenor will be referred to as the Intervenor or the Union.

[2] The Respondent-Appellant will be referred to as Respondent or Employer.

the National Labor Relations Act, which hearing resulted in a Direction for an Election.

At the time of filing of the petition for certification by the union it simultaneously submitted to the Board eighty (80) authorization cards reading in part as follows:

> *"I, the undersigned, hereby designate, select and empower the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW, AFL-CIO) as my representative for the purpose of collective bargaining in respect to rate of pay, wages, hours of employment and other conditions of employment."* (Gen. Counsel Ex. 5(a) to 5(ccc)).

Thereafter and between the time of the filing of the petition by the union and the election ordered by the Board, the employer carried on a vicious campaign against the union, in violation of the provisions of Section 8(a)(1) of the National Labor Relations Act. As a result of the campaign the union lost the election and filed timely objections to the conduct effecting the result of the elections pursuant to the provisions of the National Labor Relations Act and its Rules and Regulations (Gen. Co. Ex. 1(a)).

On or about November 30, 1966, after the union had filed its petition and during the continuance of the organizational campaign, Mr. Douglas Gravelle, the person who originally called the union, was discharged for allegedly placing obstructions in an alleyway of the employer's plant.

The employer continued his refusal to recognize the union and negotiate with it. Whereupon, unfair labor charges were filed against the employer for violation of 8(a)(1) (anti-union campaign between the time of the demand for recognition and the date of the elections); 8(a)(3) (discharge of Douglas Gravelle in violation of the provisions of the N.L.R.A.); and 8(a)(5) (Refusal to Bargain).

A complaint was issued after a thorough investigation by the Regional Director of the N.L.R.B., Region 3, and

hearings were held before Hon. Morton D. Friedman, Trial Examiner.

The hearings were commenced on October 18, 1967, and were concluded on March 27, 1968 with various adjournments in between.

The Trial Examiner found that the Respondent-Appellant violated Section 8(a)(1) of the Act by its anti-union activities (TXD, p. 42, ll. 42-45); it violated 8(a)(3) of the Act by discriminatorily discharging Douglas Gravelle (TXD, p. 42, ll. 47-50); and violated Section 8(a)(5) of the Act by its refusal to recognize the union and negotiate with it when the union represented a majority of the employees of the employer (TXD, p. 43, ll. 14-19).

Questions Presented

Although the Petitioner cites five questions presented to this Court, they really are as follows:

1. Was the due process clause of the 5th Amendment to the U. S. Constitution violated as to the Petitioner?

2. Was the decision of the United States Supreme Court in *N.L.R.B. v. Gissel,* 395 U.S. 575 misconstrued by the Circuit Court of Appeals, or is it being misconstrued by the Petitioner herein?

3. Should this Court review the findings of fact and conclusions of law which were previously reviewed by the Circut Court of Appeals, sustaining the findings of fact and conclusions of law of a Trial Examiner and the National Labor Relations Board?

ARGUMENTS

I. The discharge of Douglas Gravelle.

Petitioner, in its memorandum, claims that the decision regarding the discharge of Douglas Gravelle was a denial of "due process". In its memorandum in support of the petition, citing *N.L.R.B. v. Prettyman*, 117 F.2d 876, it argue:

> "An employer is entitled to a hearing of and the decision of the charges against him according to the fundamental principles that adhere in due process of law—the decision of the Board shall be governed by and based upon the evidence produced at the hearing" (Petitioner's memorandum, p. 5).

But this is exactly what has happened in the instant case. The mere use of the word "horseplay" by the Trial Examiner to describe the incident is hardly a violation of the due process clause or sufficient ground for review by this Court, even if the term itself does not appear in the record.

II. The petitioner misreads or misinterprets this Court's decision in *N.L.R.B.* v. *Gissel*.

The Petitioner in its memorandum quotes the following excerpts from the Court's decision:

> "—employers [sic] should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above the signature"[3]

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[3] Petitioner omitted for some reason from the citation the following:

> "There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that card will probably be used first to get an election . . ."

> "We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else".

The memorandum then adds:

> "The Court of Appeals held the cards were clear on their face *and petitioner agrees* (emphasis supplied). It decided the Trial Examiner and the Board resolved what conflicting testimony there was against the company but did not review it" (Memorandum, p. 11) [4]

The Petitioner further states:

> "The union adherents admittedly solicited cards on the represenation they sought an election" (Memorandum, p. 11) [5]

III. The testimony cited by Petitioner.

The Petitioner refers the Court to footnote 13, page 8 of its memorandum, where it quotes extracts of the testimony. Following is a short review of the testimony cited by Petitioner. Each case is a very clear and concise illustration of the following statement of this Court in *N.L.R.B.* v. *Gissel*:

> "We also accept the observation that employees are more likely than not, many months after a card drive and in response to question by a company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1)."

The testimony of the individuals cited, not only was given many months after they signed their cards, but only

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[4] Query: How did the Court of Appeals know about the contents of the cards, if it did not review the record?

[5] Who "admittedly" made such representations?

after a few days after they were questioned and spoken to by a representative of the Petitioner.

(a) *Mr. Mateucci* testified that he signed the card at a meeting because he thought it was to show attendance. He did not remember anything that was said at the meeting. He did not recall whether "election" was mentioned at the meeting. He [Smigelski] "just talked about getting the union in and stuff like that" (Tr. p. 959, ll. 6-10; ll. 13-17). He read and filled out the entire card before he signed it (Tr. p. 959, ll. 20, 21).

(b) *Mr. Hinderliter* received his card together with a pamphlet. He read it, signed it and mailed it back (Tr. p. 617, ll. 8-12).

It was properly credited by the Trial Examiner.

(c) *Donald Bellanca* is a cousin of Jerry Snyder, President of Employer (Tr. p. 801, l. 6). He was rather vague in his testimony, which contradicted previous statements made in June 1967 to a Board Representative (Gen. Co. Ex. 16; Tr. pp. 801-805).

Although, he was very vague and forgetful about Mr. Smigelski's speech at the union meeting, the witness "remembered" that Smigelski said the cards would go to the N.L.R.B.

When asked on redirect, as to exactly what Mr. Smigelski said on this matter. The witness answered:

> "A. Well, it [the cards] would be sent to the Company and then *most likely* it would go to the N.L.R.B. and it would be voted upon" (Tr. p. 816, ll. 2, 3).

It is respectfully submitted that the findings of the Trial Examiner on this card are proper.

(d) *Mr. Crook* testified that he was given a card at a union meeting (Tr. p. 750, l. 21). To the question of Counsel of Respondent: "Did *they* say what the reason for the cards were?" he answered, "So that they could

come in and have a vote" (Tr. p. 750, ll. 24, 25). He knew that the union made a demand for recognition but did not ask for return of his signed card (Tr. p. 755, ll. 1-3).

On the stand the witness denied having read the card. Yet in an affidavit given by him to a Board Representative in June 1967 he said: "I recall reading the card before signing" (Tr. p. 757, l. 17; Res. Ex. 7).

The witness met with Mr. Sullivan, whom he referred to as "the lawyer", a week before the hearing. "The foreman said that someone wanted to see me, to speak to us" (Tr. p. 758, ll. 15, 22, 24 & 25). At that meeting Mr. Sullivan discussed with the witness the charges against the Respondent and the circumstances of the card signing (Tr. p. 759, ll. 24, 25). As to the contents of the interview with Mr. Sullivan, the witness testified:

> "A. He just told us that he was going to review the questions so that we would know what charges were brought against the company and such, that's all" (Tr. p. 760, ll. 4-7).

No wonder, that the witness "forgot" what he swore to in his affidavit, given a short time after the election, and testified in accordance with his conversation with the Respondent's representative, whom he conferred with only one week before the hearing.

The Trial Examiner compared the testimony of this witness and that of Mr. Smigelski, the union organizer, as to what he said at the meeting in connection with the authorization cards and concluded that Smigelski's testimony was more reliable (TXD, p. 35, ll. 14-23). The findings of the Trial Examiner made upon observation of both witnesses should be sustained.

(e) *Mr. Schmidt* was given a card by Sam Bellavia who told him the card was "about getting representation of a vote from the UAW" (Tr. p. 668, ll. 24-25; Tr. p. 669, l. 17). He took the card home, filled it out and

mailed it (Tr. p. 671, ll. 4-15). He read the card before he signed it (Tr. p. 672, ll. 21-23).

All the attempts of Counsel of Respondent to elicit something more, proved futile.

(f) *Mr. Carney* was given a card in the plant by a Mr. Dennis, who told him: "read it over and fill it out if you want to" (Tr. p. 734, ll. 14, 15). He signed the card and turned it over to a Mr. Bishop, some time thereafter in a "gin mill" (Tr. p. 735, ll. 23-25). He read the card before he signed it (Tr. p. 736, l. 14). A week before the hearing, he was called into the office of Mr. Sullivan, the Labor Relations director of the Respondent, where he was queried about his signing a card (Tr. p. 739, l. 1). This is another case alluded to by the Supreme Court.

(g) *Mr. Troup,* in fact, signed two cards, one at the union hall and one in the plant and sent it in (Tr. p. 605, ll. 5-12). One who really believed that he signed the cards for the purpose of an election *only*, would not go to the extent of signing two of them and mailing them. This testimony is another example of the Supreme Court's allusion.

(h) *Hartman read* the card before he signed it (Tr. p. 521, ll. 5-7). The card was given to him by one of the employees, whose name he did not recall (Tr. p. 520, ll. 6-8). In answer to a direct question, whether anything was told to him when he *received* the card, he answered, "Well, *they* were talking about getting an election ... ."

To the question of the attorney for the Employer, whether anything was said to the witness when he received his card, the witness replied:

> "A. Well, *they* were talking about getting an election for—that it was, the card was for, to get an election to try to get a union down there" (Tr. p. 520, ll. 10-13).

It is, respectfully, submitted, that in view of his testimony that the card was given to him by *one* of the employees and that he read it before signing it, his answers to the queries of the attorney for respondent, were so vague and contradictory that they must be disregarded. The testimony falls within the periphery of the allusion of the Supreme Court in the *Gissel* case (*supra*).

IV. Petitioner fails to present any grounds for review by this Court.

Rule 19(b) of the Rules of the Supreme Court as amended in 1970, sets forth the following grounds for granting a writ of certiorari from a decision of a Court of Appeals:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

It is, respectfully submitted that none of the above prerequisites are contained in the petition herein.

CONCLUSION

The petition for certiorari does not set forth any grounds for review by the United States Supreme Court and should be denied.

Dated: New York, N. Y.
December 2, 1970.

Respectfully submitted,

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